Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

TILVA L. SOUZA, WILLIAM R. SOUZA, JOE O. SOUZA, JR., ROBERT J. SOUZA and CAROL DROBNY,
Petitioners,

vs.

WESTLANDS WATER DISTRICT and ACCO FINANCE CO., INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the California Court of Appeal's reversal of the trial court's judgment ordering a refund of a tax assessment deprive petitioners, in contravention of the Due Process Clause, a clear and certain remedy for collection of the assessment by Westlands Water District?

PARTIES TO THE PROCEEDING

Tilva L. Souza, William R. Souza, Joe O. Souza, Jr., Robert J. Souza and Carol Drobny are individuals.

Westlands Water District is a California water district formed under California Water Code §§ 34000 *et seq.*

ACCO Finance Co., Inc. is a Delaware corporation.

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CITATION OF REPORTED OPINION

Souza v. Westlands Water District et al. (2006) 135 Cal.App.4th 879 [38 Cal.Rptr.3d 78], Appendix A-1.

BASIS FOR SUPREME COURT JURISDICTION

The California Court of Appeal for the Fifth District filed its opinion on January 17, 2006 (App., pp. A-1, certified for publication). Petitioners seek review of that opinion on writ of certiorari.

On February 27, 2006, petitioners timely filed a petition for review with the California Supreme Court. The petition was denied on April 26, 2006. The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.1 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review on a writ of certiorari the opinion of the California Court of Appeal after denial of discretionary review by the California Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Constitution of the United States, Amendment XIV, Due Process Clause.

SUMMARY OF THE CASE

California Water Code section 36726 permits Westlands Water District ("Westlands") to add an assessment to petitioners' farmland for unpaid charges for "water and other services" incurred by petitioners' tenant. Section 32726 provides in relevant part:

> Within 10 days after the assessment is completed, the assessor shall do each of the following:
>
> * * *
>
> (c) If authorized by the board of directors by resolution, add to the assessment of each parcel of land any charges for water and other services, or either, which are unpaid. The amount so added shall be collected and shall constitute a lien as a part of the assessment levied on the parcel upon which the water for which the charges are unpaid was used and upon the lands subject to the unpaid charges for any other services.

Westlands levied and collected a $108,308 assessment on petitioners' farmland pursuant to the statute.[1]

The trial court found on essentially undisputed facts (*see* App., p. A-3) that Westlands' extension of credit to petitioners' tenant resulted in the unpaid water charges. The extension of credit, partially ameliorated by a guarantee given to Westlands by the tenant's lender, ACCO Finance Co., Inc. ("ACCO"), violated the rules and regulations enacted by Westlands' board of directors and binding on all landowners and water users.

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[1] *See* California Water Code § 36726, App. A-36.

Westlands' landowners rely on these rules and regulations to fashion transactions with their tenant water users.

No one questions the prerogative of Westlands to enact rules and regulations. Cal. Water Code § 35423.[2] Neither petitioners nor Westlands challenged the validity of the regulations at trial or on appeal. However, the Court of Appeal seized upon a single sentence in Westlands' opening brief to hold the district's statutory lien rights unassailable, irrespective of the *validity* of the unpaid water charges. (App., pp. A-12, 16.) In sum, the Court of Appeal held the rules void of any efficacy by characterizing them as "internal procedures" enforceable only by the district for its benefit. (App., pp. A-11, 14, 19). By contrast, the trial court ruled the unpaid water charges invalid and the follow-on assessment "erroneously or illegally collected," and ordered a refund. Cal. Water Code § 36832.[3]

The Court of Appeal's opinion deprives all landowners in California of any remedy for a public agency's assessment for a third party's unpaid water charges that were *illegally* incurred. (App., p. A-12: invalidating the assessment is not a "proper

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[2] California Water Code § 35423 states:

> "A district may establish, print, and distribute equitable rules and regulations for the sale and distribution of water. A district may provide therein that water shall not be furnished to (1) persons who violate the rules and regulations or against whom there are delinquent water, standby, facility, or other charges, or penalties or interest on any such charges, or (2) land against which there is a delinquent assessment."

[3] *See* California Water Code § 36832, App. A-37.

remedy for the district's violation.") California public agency jurisprudence does not permit a governmental agency to violate its own rules and regulations nor does it demand further statutory authority beyond Water Code section 36832 to support a landowner's equitable claim for a refund. Cal. Const., art. XIII, § 32 and Rev. & Tax. Code § 5096.

The Court of Appeal's opinion deprives petitioners a clear and certain remedy to challenge the legality of Beebower's unpaid water charges *after* the add-on assessment is levied. Where, as here, a taxing authority "places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment [of the United States Constitution] obligates the [taxing authority] to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18, 31 (1990). The taxpayer is entitled to a "clear and certain remedy" for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one. *Id.* at 39 [citation omitted].

The controlling principle of *McKesson* is that, because the "exaction of a tax constitutes a deprivation of property," due process requires that "the State ... provide taxpayers with, not only a fair opportunity to challenge ... their tax obligation, but also a 'clear and certain remedy,' for any erroneous ... tax collection." *Id.* at 36 [citation omitted].

This Court has long held that where a tax is paid in order to avoid financial sanctions or a seizure of real property, the tax

is paid under "duress" in the sense that the State has not provided a fair and meaningful predeprivation procedure. *See, e.g.*, *United States v. Mississippi Tax Comm'n*, 412 U.S. 363, 368 (1973) (economic sanctions for nonpayment); *Ward v. Love County Board of Comm'rs*, 253 U.S. 17, 23 (1920) (distress sale of land). Justice Holmes suggested in *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 286 (1912), that a taxpayer pays "under duress" when he proffers a timely payment merely to avoid a "serious disadvantage in the assertion of his legal … rights" should he withhold payment.

This Court should review these questions under Rule 10(c). They affect thousands of landowners in Westlands – and many more thousands throughout California – who are secondarily liable for water or other charges incurred by a third-party water user. Cal. Water Code § 36726. *See also* Cal. Water Code § 25806 (irrigation districts) and 51440 (reclamation districts).

FACTUAL BACKGROUND

A. THE PARTIES.

1. Petitioners.

Petitioners are landowners within Westlands' service area. CT p. 232, Statement of Decision ¶ 2.[4] Westlands

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[4] The Clerk's Transcript before the Court of Appeal comprises three volumes: Volume 1 (pp. 1-300); volume 2 (pp. 301-359); and a supplemental volume 1 (pp. 1-91); references are limited to the first two volumes and appear as "CT p. __." The record also includes some of petitioners' numbered trial exhibits; references appear as Trial Exhibit [#]. The Reporter's Transcript comprises four volumes, with consecutively numbered pages (1-271, 272-495, 496-788, and 789-1039); references appear as "RT p. __."

assessed petitioners' farmland $108,308 for delinquent irrigation water charges, penalties and interest incurred by petitioners' tenant, Forest and Edna Mae Beebower dba Beebower Farms ("Beebower"). The assessments were liens on petitioners' 970 acres of farmland.

2. Beebower Farms.

On February 28, 1999, petitioners Joe O. Souza, Sr. and his wife Tilva L. Souza, as landlord, entered into a written lease for 970 acres of farmland with Beebower, as tenant.[5] The term of the lease was for three years commencing on March 1, 1999 and terminating on October 31, 2001. The lease provided that Beebower would pay for all irrigation water supplied to the farmland by Westlands. *See* Trial Exhibit 4 (lease).

3. Westlands Water District.

Westlands is a local governmental entity formed under and governed by Division 13 of the California Water Code, known as the "California Water District Law." Cal. Water Code §§ 34000-38501. It is one of a group of special districts that was formed specifically to allow a group of landowners to buy water from the federal government, which ordinarily will not contract to sell water to individuals. *Westlands Water District v. United States*, 337.F.3d 1092, 1095-96 (9th Cir. 2003). The district is a "public agency" of the State of California. Cal. Water Code § 37823. Westlands is governed by an elected board of directors. Cal. Water Code § 34807. A

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[5] Mrs. Souza's four adult children, the remaining petitioners, own about 40 acres of the farmland, which they leased to their parents, who in turn leased all 970 acres to Beebower.

director must own land within Westlands. Cal. Water Code § 34700, subd. (a).

4. ACCO Finance Co., Inc.

ACCO Finance Co., Inc. is a finance company that extended credit to Beebower for growing crops on petitioners' farmland. ACCO provided Westlands with a written guarantee for the payment of water charges not to exceed $98,306 during the period of April 3, 2000 to October 30, 2000. *See* Trial Exhibit 4 (guarantee).

B. THE HISTORY OF THE BEEBOWER WATER CHARGES.

1. Water Agreement Between Beebower And Westlands.

In accordance with Westlands' Regulations, Beebower executed an Agricultural Water Allocation Application and Purchase Agreement (the "Water Agreement"). CT p. 233, Statement of Decision ¶ 7. *See* Trial Exhibit 10 (2000 Water Agreement). For billing purposes, Beebower used his pre-existing water user account with Westlands (the "Water Account"). Beebower, as the "water user" under the Water Agreement, is the primary obligor for charges to his Water Account. *See* Trial Exhibit 10. RT p. 104:1-15.

During 1999 – the first year of the lease – Beebower was delinquent in paying $52,187 of charges posted to its Water Account. CT pp. 234-235, Statement of Decision ¶¶ 9 and 12. On February 29, 2000, the last day of Westlands "fiscal" water year, Beebower paid all delinquent 1999 water charges after obtaining financing from ACCO for his 2000 crop. CT p. 238,

Statement of Decision ¶ 17. Beebower also paid petitioners rent that was several months overdue.

2. Westlands' Regulations And The Terms And Conditions.

Westlands is authorized by statute to adopt rules and regulations for the distribution of water. Cal. Water Code § 35423 (quoted at fn. 2). *See also* Cal. Water Code §§ 35424 [violation of rules and regulations is a misdemeanor] and 35413 ["district may correct any violation of an ordinance of the district or of the rule or regulation"].[6]

Pursuant to this statutory authority, Westlands enacted several quasi-legislative regulations to restrict the extension of credit to "delinquent" water users. These regulations are captioned "Westlands Water District's Terms and Conditions for Agricultural Water Service." CT p. 244, Statement of Decision ¶ 31 (the "Terms and Conditions"). *See* Trial Exhibit 50.[7] The trial court found the regulations – notably, the advance payment requirement imposed on delinquent water users – protect a landlord from the nonpayment of its tenant's water bill. CT pp. 250-251, Statement of Decision ¶ 50.

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[6] The trial court relied on Water Code §§ 35423 and 36832 (App., p. A-37) as authority for the refund (CT pp. 244-5, Statement of Decision ¶ 30) and petitioners cited it in their brief before the Court of Appeal. The Court of Appeal did not cite it or either of the correlative enforcement provisions in its published opinion.

[7] Trial Exhibit 50 contains two versions of Westlands' Terms and Conditions. The 2/17/98 version was the operative version for most of the 2000-2001 water year ending February 28, 2001. The 9/18/00 version came into effect after Beebower had incurred nearly all the delinquent water charges at issue. RT p. 376 (both versions admitted into evidence).

3. Westlands' Billing Procedures And Beebower's Water Charges.

Absent the imposition of credit restrictions, Westlands bills its water users in *arrears* for water charges attributable to its water supplies received under contracts with the United States. As a result, Westlands extends credit to a water user until its monthly bills are paid.

Over $227,540 of charges were posted to Beebower's Water Account during the 2000-2001 water year, only a portion of which was paid by Beebower or by ACCO under its guarantee, leaving an unpaid balance of $102,315 on February 28, 2001. CT p. 242, Statement of Decision ¶ 25.

C. THE BEEBOWER DELINQUENCY AND THE ADD-ON ASSESSMENT ON PETITIONERS' FARMLAND.

1. The Beebower Delinquency And Westlands' Credit Restrictions Under Paragraph 21.

Since Beebower was more than 60 days delinquent in paying his Water Account during the 1999-2000 water year, future water allocations to Beebower would be subject to the "advance payment" requirement set forth in paragraph 21 of the Terms and Conditions, which states:

> If a water user's delinquent charges are delinquent for 60 days or more, . . . the General Manager *shall* require, as a condition of resumption of water service, that advance payment of *all* water charges be made for the 12-month period immediately following resumption of service, according to a schedule to be determined by the General Manager. A written guarantee in a form satisfactory to the General Manager from a recognized financial lending

> institution *may* be substituted in lieu of advance payment." (Emphasis added.)

CT pp. 234-235, Statement of Decision ¶ 10.

Pursuant to paragraph 21, Dave Ciapponi, Westlands' director of finance, sent a letter to Beebower to inform him that the 12-month advance payment requirement would be implemented due to the then existing 60-day delinquency of his Water Account. CT p. 235, Statement of Decision ¶ 11. *See* Trial Exhibit 22 (Mr. Ciapponi's January 7, 2000 letter). Mr. Ciapponi informed Beebower:

> [Y]ou are required to submit an advance payment for the estimated cost of any water which is allocated to your account. You will be billed for these advance charges as a Water Service Deposit on the December 1999 water billing statement. This requirement will be applied to all allocations of water, including allocated non-Project water and will remain in effect during the next 12 months.

Id. The advance payment requirement was never implemented by Westlands during the 2000-2001 water year. CT p. 235, Statement of Decision ¶ 12; CT p. 245, Statement of Decision ¶ 33.

Instead, three months after mailing his letter to Beebower, Mr. Ciapponi accepted a guarantee from ACCO on April 4, 2000, which expressly limited ACCO's obligation to $98,306 "only for water." CT pp. 240-241, Statement of Decision ¶ 23. *See* Trial Exhibit 14 (ACCO guarantee).

2. The ACCO Guarantee.

The trial court found that the ACCO guarantee was

> clearly insufficient to guarantee or pay for all water charges posted to the Beebower Water Account. Westlands failed to implement

> paragraph 21 of the Terms and Conditions by its terms when it accepted the ACCO guarantee with a limited guaranteed amount and without taking reasonable steps to determine whether the $98,306 guaranteed amount would be sufficient to pay for all water charges.

CT pp. 245-246, Statement of Decision ¶ 35. CT p. 241, Statement of Decision ¶ 23: "The Court finds that Westlands did not analyze the sufficiency of the $98,306 guaranteed amount before Mr. Ciapponi accepted the guarantee." The trial court further ruled that a "guarantee that does not ensure payment of all water charges does not eliminate the advance payment requirement." CT p. 245, Statement of Decision ¶ 34.

3. The Add-On Assessments To Petitioners' Farmland.

After the second year of the lease, Beebower failed to obtain additional financing from ACCO and abandoned the farmland. Trial Exhibit 15 (Westlands February 2001 bill). Three months later, Westlands by Board resolution dated May 14, 2001, added the unpaid water charges – then totaling $105,408 – to the land-based assessments on petitioners' farmland.[8] Water Code § 36726. CT p. 242, Statement of Decision ¶ 27. Trial Exhibit 56 (Westlands' 2001 Assessment

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[8] Late payment of Westlands' water bills results in penalties (computed on the unpaid balance at 2% for the first late payment, 5% for the next late payment, and 10% for subsequent late payments within a 12-month period) and interest charges (at 1-1/5% per month). RT p. 106-107. Over $28,500 of the assessment was attributable to penalties and interest posted to the Beebower Water Account. *See* Trial Exhibit 63 (minutes of Westlands' November 19, 2001 Board meeting, p. 2) and TE 76 (spreadsheets). *See* Cal. Water Code § 35470.5.

Statement). Beebower's obligations to Westlands and ACCO were subsequently discharged in bankruptcy.

The assessments were senior liens on petitioners' farmland and had "priority over other liens in accordance with Revenue and Taxation Code section 2192.1." CT pp. 249-250, Statement of Decision ¶ 47. The liens for the assessments posed a significant untenable financial risk to petitioners since "Westlands had the power to sell the petitioners' farmland for the nonpayment of a delinquent assessment. Water Code § 36951." CT p. 250, Statement of Decision ¶ 48.

Moreover, the Terms and Conditions prohibited the delivery of irrigation water to any farmland with an unpaid assessment. CT p. 243, Statement of Decision ¶ 28. The petitioners' could not rent or otherwise farm their land without irrigation water deliveries from Westlands. Accordingly, petitioners must pay the assessment to ensure that their farmland will receive an irrigation water allocation for the subsequent water year, which begins March 1. *Id.*

D. THE PROCEEDINGS BELOW.

1. Payment Of The Assessments.

Additional interest accrued on the assessment, and on February 25, 2002, petitioners paid $105,052 to Westlands, after an unrelated refund for $3,256.00 was applied by Westlands to the outstanding assessments. CT p. 243, Statement of Decision ¶ 28. *See* Trial Exhibit 57 (refund letter) and Trial Exhibit 65 (check).

Petitioners paid the assessment "to preserve their right to receive a water allocation from Westlands for the water year

beginning March 1, 2002:" CT p. 243, Statement of Decision ¶ 28. As the court below recognized,

> petitioners as a practical matter were required to satisfy the lien before the commencement of the [2002-2003] water year in order to receive an allocation of water from Westlands or to obtain deliveries of surface water from other sources.

CT p. 250, Statement of Decision ¶ 49. After the assessment was paid, petitioners filed a claim for refund with Westlands on April 24, 2002, which was denied. CT p. 242, Statement of Decision ¶ 27. *See* Trial Exhibit 63 (verified "Claim for Refund [Water Code § 36833]").

2. Petitioners Sue Westlands and ACCO.

After a 10-day court trial, the trial court issued a Statement of Decision, Findings of Fact and Conclusions of Law (the "Statement of Decision"). CT pp. 230-257. The trial court ruled that a $108,308 land-based assessment levied on petitioners' farmland by Westlands Water District was invalid and ordered a refund for two reasons.

First, the origin of the assessment on petitioners' farmland was the unpaid water charges, late charges, penalties, and interest for which advance payment was required by Westlands' Terms and Conditions.[9] CT p. 245, Statement of Decision ¶ 33. The unpaid water charges were directly attributable to Westlands' failure to curtail the extension of

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[9] Petitioners' farmland is eligible to receive irrigation water supplies from Westlands, in accordance with the (i) Regulations for the Allocation and Use of Agricultural Water Within Westlands Water District ("Regulations") and the (ii) Terms and Conditions. CT p. 244, Statement of Decision ¶¶ 30 and 31). *See* Trial Exhibit 50 (Terms and Conditions) and TE 51 (Regulations).

credit to Beebower, compounded by Westlands accepting an insufficient guarantee from ACCO. Westlands' own rules and regulations require the advance payment of "all water charges" for certain "delinquent" water users, such as Beebower. *Id.* (emphasis in original.)

Second, Westlands acceptance of a third-party guarantee did not vitiate Westlands obligation to collect advance payment from Beebower. CT p. 245, Statement of Decision ¶ 34. The ACCO guarantee failed to satisfy the express terms of the Terms and Conditions in several respects. CT p. 242, Statement of Decision ¶ 25. Most importantly, the ACCO guarantee did not require payment for all Beebower water charges for the ensuing 12-month period. CT p. 245, Statement of Decision ¶ 34: "[T]he guarantee must reasonably ensure 'that all water charges will be paid monthly.'"

The Court of Appeal did not dispute these factual and legal findings. Indeed, the Court of Appeal reversed the trial court on the ground that the remedy – the refund of the add-on assessment to petitioners' farmland – is not allowed as a matter of law.

> Assuming the district violated its regulation, no authority supports the notion that the violation gave the owner the right to escape an assessment otherwise valid and authorized by statute.

(App., p. A-2-3.) In doing so, the Court of Appeal relegated Westlands' Regulations and Terms and Conditions to a "benign measure" (App., p. A-16) that, at best, was a "mandatory internal procedure" (App., p. A-14), unenforceable by landowners by law or water users by agreement.

Petitioners did not petition for a rehearing in the Court of Appeal. Petitioners' petition for discretionary review by the California Supreme Court was denied on April 26, 2006.

ARGUMENT

At its core, the Court of Appeal decision rests with the unsupportable notion that Westlands' Terms and Conditions prohibiting the extension of credit to Beebower was a mere "internal procedure" legally ineffective for the petitioners to challenge the legality of the unpaid water charges and consequent add-on assessment. (App., p. A-11.) In sum, the Court of Appeal held that the validity of the assessment on the petitioners' farmland does not depend on "whether the district followed its procedures in attempting to obtain payment from a tenant before adding the charges to the assessment." (App., p. A-12.)

The Court of Appeal did *not* hold that the Terms and Conditions were *not* quasi-legislative regulations, as found by the trial court. Rather, the Court of Appeal held that a refund of the add-on assessment was not a remedy available to petitioners for two reasons. First, Water Code section 36726 does not provide that the validity of the add-on assessment depends on the district's compliance with its regulations (App., p. A-12). Second, the regulations "do not state or imply that following them is a precondition of the enforceability of the district's statutory rights against landowners." *Id.*

While these observations may be true, the undisputed fact, as found by the trial court remains: The unpaid water charges and the consequent add-on assessment would not have existed had the district collected advance payment from

Beebower for all water charges or received an adequate guarantee from ACCO. CT pp. 245, 247 (Statement of Decision ¶¶ 31, 38). Thus, the trial court found the add-on assessment was directly attributable to the district's failure to abide by its regulations. Accordingly, the add-on assessment to petitioners' farmland did not have some independent existence apart from the unpaid water charges and the appropriate equitable remedy was a refund. CT p. 248 (Statement of Decision ¶ 40).

Petitioners respectfully submit that the Westlands levied the add-on assessment based on unpaid water charges for *illegal* water sales to Beebower. Therefore, as a matter of law, the appropriate (and only) remedy is a refund of the erroneously or illegally collected add-on assessment pursuant to Water Code section 36832 (App., p. A-37). *See, e.g., Woosley v. State of California* (1992) 3 Cal.4th 758, 772 [class members who paid excessive license fees on vehicle purchases outside of California were entitled to a refund]. California courts have held that where taxes or fees have been illegally levied and payment is effected by compulsion, the taxpayer is entitled to a refund. *Flynn v. City and County of San Francisco* (1941) 18 Cal.2d 210, 216 (taxpayer believed payment of illegal license tax was necessary to protect his business); *Jordan v. Dept. of Motor Vehicles* (1999) 75 Cal.App.4th 449 (affirmed refund of unconstitutional smog impact fee).

A. THE COURT OF APPEAL'S OPINION RESTS ON AN ERRONEOUS HOLDING FOR THE IMPORT OF QUASI-LEGISLATIVE REGULATIONS.

Neither the trial court nor the Court of Appeal found Westlands rules and regulations, comprised of the Regulations and the Terms and Conditions, invalid. Westlands did not challenge the validity of the regulations. The Court of Appeal, however, held the enforcement of a regulation could not impair the district's assessment power, even if that regulation was a quasi-legislative regulation validly enacted by the district under express statutory authority. Cal. Water Code § 35423 (quoted at fn. 2.)

Paragraph 21 of the Terms and Conditions is precisely the type of regulation contemplated by section 35423 – it restricts the sale of water on credit to certain water users with a history of delinquency. Paragraph 21 is a *valid* administrative regulation, which has the force and effect of law. *Maryland Casualty Co. v. United States* (1920) 251 U.S. 342, 349; *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 401.

Based on this guiding legal principle, the trial court found the advance payment requirement of paragraph 21 of the Terms and Conditions mandatory.[10] CT p. 244 (Statement of Decision ¶ 32). It also found that the advance payment requirement could be suspended if Westlands received a

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[10] The use of the word "shall" in a regulation is usually construed as mandatory. *Los Angeles County Dept. of Children and Family Service v. Superior Court* (2001) 87 Cal.App.4th 1161, 1166.

"written guarantee ... that all water charges will be paid monthly." CT p. 245 (Statement of Decision ¶ 34). Further, "[a] guarantee that does not ensure payment of all water charges does not eliminate the advance payment requirement." *Id.* In sum, the trial court limited the reach of Westlands' assessment power under Water Code section 36726 to "[*valid*] water and other services, or either, which are unpaid."

The failure of Westlands to comply with paragraph 21 resulted in *unlawful* sales of water to Beebower, which remaining unpaid, were added to the assessment on the petitioners' farmland. Petitioners submit that the only appropriate inquiry is whether paragraph 21 is a valid regulation adopted within the scope of Westlands statutory rulemaking authority. If paragraph 21 is *valid*, then an add-on assessment, based on water sales where no advance payment was collected, is *invalid*.

Where a taxing authority seeks to impose a tax (as opposed to where a taxpayer claims a tax exemption), the court construes the taxing statute most strongly against the government and in favor of the taxpayer. *Barker Bros. Inc. v. Los Angeles* (1938) 10 Cal.2d 603, 608; *Knudsen Dairy Products Co. v. State Bd. of Equalization* (1970) 12 Cal.App.3d 47, 52-53 ["Tax laws are to be strictly construed in favor of the taxpayer. [Citation] This is especially true where the statute seeks to impose the tax liability of one person on another in order to facilitate its collection."] *In re Parrott's Estate* (1926) 190 Cal. 107, 113 [Interpretation of taxation act should not ignore legislative intention, or make its application

impracticable, unfair, or unreasonable. Citing Cal. Civil Code §§ 4 and 3542.]

Here, the only reasonable construction of Water Code section 36726 comports with the trail court's statement of decision. *See Willard v. Glenn-Colusa Irr. Dist.* (1927) 201 Cal. 726, 745 [rule requiring payment in advance of tolls for water used by landowners held not illegal]; *Henderson v. Oroville-Wyandotte Irr. Dist.* (1931) 213 Cal. 514, 531 [water rates charged to outside water users in excess of contract rates were invalid]. The Terms and Conditions enacted by Westlands were valid quasi-legislative regulations governing sales of water to delinquent water users. The sales of water to Beebower without advance payment were unlawful. The resulting unpaid water charges, therefore, could not lawfully be in included in the district's add-on assessment to petitioners' farmland.

Principles of due process require an agency to follow its own regulations, which have the force of law. The United States Supreme Court has consistently required strict governmental compliance with regulations designed to safeguard individual interests. Thus, where internal regulations afford procedural protections rather than facilitate agency housekeeping, the Court has insisted on compliance. *See, e.g., American Farm Lines v. Black Ball Freight Services* (1970) 397 U.S. 532, 538. *See also Marshal v. Lansing*, 839 F.2d 933, 943 (3d Cir. 1988), citing *inter alia*, *United States v. Nixon*, 418 U.S. 683, 695-96 (1974) [Parole Commission has a due process obligation to follow its own regulations].

Here, Westlands' rules and regulations are not mere internal housekeeping procedures. The rules and regulations

were promulgated by Westlands in a legislative capacity and have the force of law.

> Quasi-legislative rules, promulgated pursuant to a delegation of the Legislature's lawmaking power, have the dignity of statutes, so when a court assesses the validity of such rules, the scope of its review is narrow: if the court is satisfied that the rule in question falls within the lawmaking authority delegated by the Legislature, that the rule is reasonably necessary to implement the purpose of the statute, and that it is consistent with the controlling law, then judicial review is at an end.

Yamaha Corp. of America v. State Bd. of Equalization (1999) 73 Cal.App.4th 338, 349-350, citing *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10-11, fn. 4.[11]

Westlands must comply with its rules and regulations that confer significant benefits on its landowners and water users. The due process clause is invoked where, as here, "an individual has reasonably relied on agency regulations promulgated for his guidance or benefit and has suffered substantially because of their violation by the agency." *Tolchin v. Supreme Court of the State of N.J.*, 111 F.3d 1099, 1155 (3d Cir. 1997), quoting *United States v. Caceres*, 440 U.S. 741, 752-753 (1979).

Accordingly, this Court in *American Farm Lines, supra,* recognized a *limited* exception to the rule that an agency's

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[11] In regard to the "reasonable necessity" requirement, the courts "will defer to the agency's expertise and will not 'superimpose its own policy judgment upon the agency in the absence of an arbitrary and capricious decision'." *Agricultural Labor Relations Bd., supra,* 16 Cal.3d 392, 411, citing *Pitts v. Perluss* (1962) 58 Cal.2d 824, 832.

action taken in violation of its own regulations is void. An administrative agency has discretion to relax or modify internal housekeeping regulations that serve as "mere aids to the exercise of the agency's independent discretion," as long as the complaining party has not suffered "substantial prejudice." 397 U.S. at 539. However, the exception announced in *American Farm Lines* does not apply if the agency's regulations were intended "to confer important procedural benefits upon individuals" or other third parties outside the agency. *Id.* at 538.

California case law has followed these same legal principles. It is well settled that an administrative agency must act within the powers conferred upon it by law and may not validly act in excess of those powers. When an administrative agency acts in excess of the powers conferred upon it, its action is void. *See Graves v. Comm'n on Professional Competence* (1976) 63 Cal.App.3d 970. Similarly, an agency's failure to follow its own regulations will invalidate the agency's actions. This is particularly true where the rights of individuals are affected. *See Layton v. Merit System Comm'n* (1976) 60 Cal.App.3d 58, 63. A public agency of the state, such as a water district, is held to this same standard and must follow its own rules. *National Identification Systems, Inc. v. State Bd. of Control* (1992) 11 Cal.App.4th 1446, 1453; *Monterey Mechanical Co. v. Sacramento Regional County Sanitation Dist.* (1996) 44 Cal.App.4th 1391, 1414.

B. THE COURT OF APPEAL'S RULING DEPRIVES PETITIONERS OF A CLEAR AND CERTAIN REMEDY.

Under California Water Code section 36726, a landlord in Westlands faces significant financial liability for water

charges not paid by a tenant. Water Code section 36832 expressly permits a refund of "any assessments, penalties or costs thereon" when they were "[e]rroneously or illegally collected."

The phrase "erroneously or illegally collected" is used in many tax refund statutes. *See, e.g.*, Rev. & Tax Code §§ 5096, 5097, 6901, 11551, 30361, 38601, 40111, 45651, 46501, 50139 and 55221; Water Code §§ 26001, 31967 and 72072.11.[12] Revenue and Taxation Code section 5096 is not limited to the recovery of taxes erroneously or illegally levied, subd. (c), but authorizes the refund of taxes erroneously or illegally collected, subd. (b). A refund action "is available whenever taxes have been paid more than once; erroneously or illegally collected; illegally assessed or levied." 2 Callaghan, TAXING CAL. PROPERTY (3d ed. 2003) Judicial Review of Assessments, § 30.02, p. 8. *See S. Siwel Co. v. County of Los Angeles* (1946) 27 Cal.2d 724, 731 [where taxes are paid under protest on property entitled to exemption, a refund is in order upon the filing of a proper and timely claim], citing *Evans v. County of San Joaquin* (1945) 67 Cal.App.2d 452, 455.[13]

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[12] For property taxes, Revenue and Taxation Code section 5096 provides that the board of supervisors shall order any taxes that were erroneously or illegally collected to be refunded. Section 5097 sets forth the procedure for making a claim for refund. Section 5140 identifies the persons with standing to sue for a refund.

[13] Statutory authority for the refund of taxes "erroneously or illegally collected" dates from 1872 when the Legislature enacted section 3804 of the Political Code. *See Stewart Law & Collection Co. v. Alameda County* (1904) 142 Cal. 660, 665 [judicial relief is available for an alleged erroneously assessed tax]; *Pacific Coast Co. v. Wells* (1901) 134 Cal. 471, 474 ["This being a remedial statute, it should be liberally construed so as to carry out its intent and object."] Following settled rules of statutory construction, "[i]dentical language appearing in separate provisions

(Footnote continued on next page)

The close relationship between the Water Code and Revenue and Taxation Code provisions was discussed by Justice Traynor in *Helvey v. Sax* (1951) 38 Cal.2d 21, 25, where the Supreme Court construed the efficacy of a collector's deed issued by a county water district as commensurate with a tax deed issued by a county tax collector:

> The principles established by the Revenue and Taxation Code and the decisions construing it, are applicable to the similar statute involved in the present case.

Similarly, the provisions of the Revenue and Taxation Code apply to other kinds of "special districts." *Hanjin International Corporation v. Los Angeles County Metropolitan Transportation Authority* (2003) 110 Cal.App.4th 1109, 1112-1113 (The four-year statute of limitations in Revenue and Taxation Code section 5097 applies to an action for refund of overpayment of special benefit assessment.)

The Court of Appeal held that a refund of the assessment on petitioners' farmland was not a remedy for Westlands' failure to follow its rules and regulations. Thus, notwithstanding the trial court's finding that no water charges should have posted to the Beebower Water Account without advance payment, the Court of Appeal held that the district's violation of its own regulation did not impair its statutory right to add the unpaid water charges to the landowners' assessment. (App., p. A-10.)

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dealing with the same subject matter should be accorded the same interpretation." *Walker v. Superior Court* (1989) 47 Cal.3d 112, 132.

Petitioners respectfully submit that the invalid water charges gave rise to an illegally collected assessment and a refund was the proper (and only) remedy. A claim for a tax refund is essentially a claim in restitution and is governed by equitable principles. *See* RESTATEMENT 3D RESTITUTION AND UNJUST ENRICHMENT (T.D. No. 1, 2001) § 19, com. (d) ["inherent equitable appeal of a claim in restitution to recover improper tax payments is widely acknowledged."]. The Court of Appeal's decision should, therefore, be reversed.[14]

"In a suit for tax refund, the taxpayer has the burden of proof; he must affirmatively establish the right to a refund of the taxes by a preponderance of the evidence." *Consolidated Accessories Corp. v. Franchise Tax Bd.* (1984) 161 Cal.App.3d 1036, 1039. A taxpayer cannot satisfy its burden of proof merely by asserting error and thereby attempt to shift to the

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[14] The Court of Appeal asserted that petitioners' brief on appeal "cites no authority at all for the view that the district's violation of paragraph 21 forfeited its right to add unpaid water charges to the assessment on the land." (App., p. A-14.) The brevity of citations in petitioners' brief on appeal, *e.g.*, Water Code § 36832, Rev. & Tax. Code §§ 4807, 5096 and 5097, and *Helvey v. Sax, supra*, was due to the complete failure of Westlands to challenge – as a matter of law – whether invalid water charges can result in a refundable assessment. On this point, Westlands argument was a single sentence, with no analysis, argument or authority:

> The Souzas apparently do not contend that the assessment power, itself, is illegal; they contend that deviation from procedure found in the Terms and Conditions invalidates the assessment so as to bar placement of a lien upon the land.

Westlands' Opening Brief, p. 11. Under normal circumstances, Westlands' failure to offer any legal argument, citation to authorities, or citation to the record would have waived this claim on appeal. *See, e.g., Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979. *Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1 [passing reference in brief insufficient ; court will not develop the appellants' arguments for them.]

taxing agency the burden of justifying the tax. *Capitol Records, Inc. v. State Bd. of Equalization* (1984) 158 Cal.App.3d 582, 589. Accordingly, petitioners bear the burden of proving that they were entitled to refund of the assessment grounded on an invalid water charges.

Whether a taxpayer has met its burden of proof is governed by equitable considerations. *Sprint Communications Co. v. State Bd. of Equalization* (1995) 40 Cal.App.4th 1254, 1259. *See Simms v. County of Los Angeles* (1950) 35 Cal.2d 303, 316. California courts have declared that "since a suit for a refund of taxes is governed by equitable principles, a plaintiff who challenges the validity of a tax may recover only if it be shown that more has been exacted than in equity and good conscience should have been paid." *Sprint, supra,* 40 Cal.App.3d at p. 1259, quoting *Goodwill Industries v. County of Los Angeles* (1953) 117 Cal.App.2d 19, 27.

Equity compels a refund of the add-on assessment on petitioners' farmland since the unpaid water charges resulted from Westlands' deliberate failure to impose advance payment on Beebower or to procure an adequate guarantee from ACCO. The California Supreme Court has fashioned remedies for taxpayers on equitable principles in the absence of direct statutory authority. *Javor v. State Bd. of Equalization* (1974) 12 Cal.3d 790.

In *Javor,* a purchaser of a new car brought a class action against the State Board of Equalization (SBE) and a large class of car retailers, alleging that the retailers had collected excessive reimbursement for sales and use taxes in selling new cars, which in turn had been paid to the SBE. 12 Cal.3d at pp. 793-

794. However, the car buyers could not seek a refund directly from the SBE under applicable statutes since the retailers, not the car owners, were the taxpayers. After the SBE's demurrer to the complaint was sustained without leave to amend, the car buyers asked the California Supreme Court to fashion an equitable remedy by which they could obtain the refunds.

The Court permitted the plaintiffs to join the SBE as a party in their action against the retailers for remittance of the overpaid sales taxes. 12 Cal.3d at p. 802. The reason was simple equity. Absent joinder of the SBE, the retailers would not pursue any claims for refunds since a SBE regulation required the retailers to remit the refunds to the car buyers who erroneously overpaid the sales taxes. Since the retailers were not required to seek refunds, they had no financial interest to seek them. Accordingly, this Court found

> the situation is an unique one for which the courts should fashion a remedy based on broad principles of restitution.

Id. 797. The joinder of the SBE would foster payment of the refunds into court. Without this remedy, the SBE would be unjustly enriched by any retained overpayments of sales and use taxes, contrary to its "duty to protect the integrity of the sales tax by ensuring that the customers receive the refunds." *Id.* at p. 800.

In *Romulus City Treasurer v. Wayne County Drain Comm'r* (1982) 413 Mich. 728, 322 N.W.2d 152, the Michigan Supreme Court fashioned an equitable remedy for refunding illegal drainage assessments. In *Romulus,* township and city treasurers and landowners sued the county drain commissioner for constructive fraud and alleged that the defendant improperly

used funds collected as a special assessment to pay administrative costs. *Id.* at 733. Several hundred thousand dollars in special assessment drain taxes were held in escrow. *Id.* at 734. The landowners demanded a refund of the taxes paid and the city treasurers refused to release the funds to the defendant. *Id.* at 734. Under "the rule that equity will grant complete relief," the Court held that, if such "extraordinary circumstances" conferred a right on the treasurers to withhold the escrowed taxes from the county based on constructive fraud, the Michigan Circuit Court, as opposed to the Michigan Tax Tribunal, could decide whether the money should be returned to the taxpayers. *Id.* at 746.

The Michigan Supreme Court further reasoned that, if the return of escrowed money were characterized as a traditional tax refund, after the Circuit Court determined a fraud occurred, the Circuit Court "would be in an intractable position" of having to then turn the case over to the Tax Tribunal to decide issues related to taxpayer refunds. *Id.* at 746-747. In a concurring opinion, Justice Levin noted the plaintiffs were seeking refunds for the illegal drainage district assessments and characterized the jurisdiction of the Circuit Court as follows:

> Courts are established to provide a forum in which rights recognized by the law can be vindicated. A property owner has a right recognized by law not to be assessed except in accordance with the authority conferred by the statute under which the assessing body purports to act. When the established procedures are inadequate to vindicate a recognized right, equity will permit maintenance of the cause and fashion an appropriate remedy.

Id. at 765.

The Court of Appeal's decision does not do equity, but deprives petitioners of any remedy for Westlands unlawful extension of credit to Beebower in contravention of paragraph 21 of the Terms and Conditions. Water Code section 36832 identifies the appropriate statutory remedy: A refund of the assessment that was erroneously and illegally collected from petitioners.

Due process requires a fair opportunity to challenge the accuracy and legal validity of a tax *and* a "clear and certain remedy" if an unlawful tax is paid to ensure that the opportunity to contest the tax is a meaningful one. *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18, 39 (1990) [citation omitted]. Petitioners were deprived of due process by the Court of Appeal's failure to recognize, let alone craft, a meaningful postdeprivation remedy. Unless landowners are accorded a remedy, Westlands will be encouraged to pursue questionable sales of water and other services, banking on the landowner's payment upon a water user's default.

Moreover, in this case Westlands overtly and purposely circumvented its own rules and regulations and should not be rewarded for activities that thwart its obligation to uphold and enforce the law. Without the remedy of a refund for the assessment, Westlands' failure to adhere to its own rules and regulations will escape judicial scrutiny.

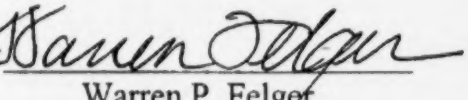
CONCLUSION

Review of the Court of Appeal's decision through a writ of certiorari will provide petitioners' with postdeprivation relief from the illegal add-on assessment that conforms to the

teachings of this Court and that preserves fundamental notions of due process.

Respectfully submitted,
FELGER & ASSOCIATES

Dated: July 21, 2006.

By: 
Warren P. Felger
Attorneys for Petitioners

APPENDIX

TILVA L. SOUZA, Individually and as Trustee, etc., et al., Plaintiffs-Appellants, v. WESTLANDS WATER DISTRICT et al., Defendants-Appellants.

TILVA L. SOUZA, Individually and as Trustee, etc., et al., Plaintiffs-Respondents, v. WESTLANDS WATER DISTRICT et al., Defendants-Appellants.
Nos. F0445293, F046478

THE COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

135 Cal.App.4th 879, 38 Cal.Rptr.3d 78, 06 Cal. Daily Op. Serv. 488, 2006 Daily Journal D.A.R. 695

Filed January 17, 2006.
Review Denied April 26, 2006.

PRIOR HISTORY:

Appeal from a judgment of the Superior Court of Fresno County. Mark W. Snauffer, Judge.

DISPOSITION:

The judgments in favor of the Souzas against the district and ACCO and the award of attorneys' fees are reversed. The Souzas' cross-appeal is dismissed as moot. Costs are awarded to appellants.

COUNSEL:

Felger & Associates, Warren P. Felger and Jennifer D. Reisz for Plaintiffs and Appellants.

Borton, Petrini & Conron, Thomas C. Matychowiak and Lawrence E. DeWitt for Defendant and Appellant Westlands Water District.

McKinley & Capeloto, Robert D. McKinley; McKinley & Associates, Robert D. McKinley, for Defendant and Appellant ACCO Finance Co.

OPINION:

WISEMAN, J.

By statute, a California water district may add unpaid water charges to its regular assessment against land served by the district. The assessment automatically constitutes a lien on the land, and this is true whether the water was used by the owner or a tenant. This case presents an issue of first impression: Where the water is used by a tenant, does a district forfeit its right to add the charges to the assessment and encumber the land because, had the district followed its own regulations, the tenant would have been required to post adequate security for all the charges in advance or the water would have been turned off? Specifically, does the district lose the statutory rights just described if, pursuant to its regulations, it demands a guaranty before continuing to supply water to a tenant with a history of delinquencies, but then, contrary to its regulations, supplies more water than the guaranty can cover and the tenant again defaults? The trial court's judgment against Westlands Water District answered this question in the affirmative, effectively converting the district's regulations on delinquent customers from a shield for the district to a sword for delinquent customers' landlords. It ruled that the assessment against the land was invalid because the district violated its regulations when it supplied water without obtaining an adequate guaranty from the tenants. This was error. Assuming the district violated its regulation, no authority

supports the notion that the violation gave the owner the right to escape an assessment otherwise valid and authorized by statute.

The trial court was also incorrect in its alternative ruling that the landowners were entitled to enforce the regulations as intended third-party beneficiaries of the water agreement between the tenants and the district. The agreement referred to and incorporated the district's regulations. For multiple reasons, however, the owners could not have been third-party beneficiaries as a matter of law.

We decline to address the landowners' argument that the assessment violated their right to equal protection of the laws, which they have raised for the first time on appeal. We reverse the judgment against the district and the award of attorneys' fees the owners obtained as prevailing parties.

Finally, we also reverse the judgment in favor of the owners against the guarantor. The court erred in ruling that the owners could recover as third-party beneficiaries of the guaranty provided by the tenants to the district.

FACTUAL AND PROCEDURAL HISTORIES

The essential facts are undisputed. We draw them primarily from the trial court's statement of decision.

The plaintiffs are members of the Souza family (the Souzas), who own farmland in the area served by defendant Westlands Water District (the district). They leased the land to Forrest and Edna Mae Beebower (the Beebowers) for the period from March 1, 1999 to October 31, 2001. Among other things, the lease required the Beebowers to pay the water bill.

The Beebowers entered into a contract with the district for irrigation water by executing an Agricultural Water Allocation Application and Purchase Agreement (the water agreement) and submitting it to the district. In the water agreement, the Beebowers promised "[t]o comply with the Terms and Conditions for Agricultural Water Service and the Regulations for the Allocation of Agricultural Water ... both of which are incorporated herein as though set forth at length." Paragraph 18 of the Terms and Conditions provided that "[a]gricultural water service shall not be provided to any water user with delinquent charges ...." Paragraph 21 of the Terms and Conditions (paragraph 21) stated:

> "If a water user's delinquent charges are delinquent for 60 days or more ... the General Manager shall require, as a condition of resumption of water service, that advance payment of all water charges be made for the 12-month period immediately following resumption of service, according to a schedule to be determined by the General Manager. A written guaranty in a form satisfactory to the General Manager from a recognized financial lending institution may be submitted in lieu of advance payment."

During the first year of the lease, at the end of 1999, the Beebowers fell behind in their water payments and had delinquent charges for more than 60 days. The district instructed them by letter to comply with paragraph 21. The letter stated that if the Beebowers used the guaranty option, the guaranty must be sufficient to cover all water used through January 31, 2001.

On February 29, 2000, the Beebowers paid all their outstanding charges and had a zero balance on their account on

March 1, the first day of the water year. The Beebowers also obtained a guaranty from defendant ACCO Finance Company (ACCO) for future water payments. The district accepted it on April 4, 2000. It guaranteed payments for water purchased after April 3, 2000, up to $98,306, and had an expiration date of October 30, 2000.

At the time the Beebowers were behind in their water payments at the end of 1999 and early 2000, they also fell behind in their rent payments. After they missed the rent payment of $175,000 for the second year of the lease, due on November 1, 1999, the Souzas obtained a judgment against them and a writ of possession. The Beebowers subsequently paid the rent, however, and were not evicted.

The Beebowers experienced financial difficulties again in the second year of the lease. They defaulted on their July 2000 water bill for $52,586.02. The district submitted that invoice to ACCO, which paid it. The district subsequently obtained payments of $14,355.80 from ACCO for additional delinquent charges. ACCO refused to pay more, claiming that the balance of the $98,306 guaranty (i.e., $31,364.18) had been consumed by water payments it made on the Beebowers' behalf before they defaulted.

During this period, the Souzas were aware of the Beebowers' financial problems and through their lawyer sent a letter to the district requesting that it provide them with duplicates of the monthly invoices sent to the Beebowers. The district wrote back explaining that copies of each invoice were already being sent to the Souzas and that if they wished additional control over the account, they could substitute

themselves as the water users for their parcels. This was never done.

The district continued supplying water to the Beebowers while they were in default and after the ACCO guaranty was exhausted. The Beebowers were never able to pay. On May 15, 2001, the district added the Beebowers' delinquent water charges to the regular assessment on the land. With penalties and interest, the additional assessment was $108,308.95.

The Souzas filed a Notice of Claims Against Public Entity with the district on October 5, 2001, seeking to discharge the assessment. The district denied the Souzas' claims. Next, on December 10, 2001, the Souzas requested that the district waive paragraph 18 of the Terms and Conditions, barring water service to land on which delinquent charges have been incurred, so that farming operations could continue on the land while they sought judicial relief. The district denied this request also, observing that the Souzas had the ability to pay first and pursue relief afterward. To ensure that water would be supplied to the land the next year, the Souzas paid the additional assessment.

The Souzas then filed this litigation against the district and ACCO. Against the district, the complaint alleged eight causes of action: breach of the written water agreement (of which the Souzas claimed to be third-party beneficiaries); breach of an oral promise not to place a lien on the property; breach of fiduciary duty; negligent misrepresentation; negligence; promissory estoppel; removal of cloud on title; and indemnity. Against ACCO, the complaint alleged breach of the guaranty agreement, also under a third-party-beneficiary theory.

The case was tried to the court sitting without a jury. The trial was bifurcated, with the district presenting its governmental immunity defenses in the first phase. The court ruled that the district had immunity from the Souzas' claims of negligent misrepresentation and negligence. During the second phase, after the plaintiffs rested, the court granted judgment for the district on the Souzas' claims of breach of an oral contract (for lack of evidence), promissory estoppel (by plaintiff's stipulation), and breach of fiduciary duty (no such duty between landowner and water district). After the plaintiffs' closing argument, the plaintiffs stipulated to judgment for the district on the claim for removal of a cloud on title.

During trial, the Souzas requested leave to amend their complaint to conform to proof. They sought leave to add a cause of action for a refund of an invalid assessment. The court granted the request over the district's objection. The amended complaint alleged that the assessment was invalid because it resulted from the district's failure to obtain advance payment from the Beebowers or a guaranty covering all charges. The amended complaint also added ACCO as a defendant on the indemnity claim.

The claims remaining after trial were breach of the water agreement, invalid assessment, indemnity, and breach of the guaranty agreement. The court issued a statement of decision resolving these, relying primarily on the invalid-assessment theory to find for the Souzas. The court reasoned that paragraph 21 had the force of law because it was a quasi-legislative rule promulgated pursuant to authority delegated by the Legislature. The district violated paragraph 21, the court found, because it did

not obtain payment from the Beebowers in advance after their delinquency, and did not obtain a guaranty sufficient to cover 12 months of charges. The district should have taken, but did not take, reasonable steps to ensure that the $98,306 guaranty was enough, according to the court: Several reasonable methods of projecting the Beebowers' water costs for the year were available to the district, yielding estimates between $170,691 to $294,000, showing that the guaranty's limit was far too low. Asserting that "Westlands must follow its own rules before levying assessments on plaintiffs' Farmland," the court concluded that the Souzas were entitled to a refund.

The court also found that the district breached the water agreement and that the Souzas could recover for the breach as third-party beneficiaries. The district breached the agreement, the court ruled, by violating paragraph 21 of the Terms and Conditions. Emphasizing the benefit that would have inured to the Souzas if the district had not violated paragraph 21, the court found that the Souzas must have been intended, not incidental, beneficiaries.

The statement of decision further stated that ACCO breached its guaranty agreement when it refused to pay $31,364.18 of the face amount after the Beebowers' default because it had already paid that portion before the default. The court concluded that, because that payment was made before default, it was not a payment under the guaranty, so ACCO was liable to pay it again after the default. The court found that the Souzas were intended third-party beneficiaries of the guaranty for the same reasons they were intended third-party beneficiaries of

the water agreement. It ruled that the district was entitled to a credit for any amount the Souzas should collect from ACCO.

Finally, the court ruled against the Souzas on their indemnity theory against the district. It found there was no oral or written promise by the district to indemnify the Souzas against losses caused by the Beebowers' default and therefore no liability under the doctrine of express contractual indemnity. After mentioning the doctrines of implied contractual indemnity and equitable indemnity, the court made no ruling on them, apparently assuming the Souzas were not relying on those doctrines. The statement of decision does not address the Souzas' indemnity claim against ACCO, presumably because of the ruling on the breach of contract claim against ACCO.

After judgment was entered for the Souzas, they filed a motion for $179,449 in attorneys' fees and $16,336 in costs. The court granted the motion, awarding the full amount of fees and $7,091.99 in costs. The court's order cited Revenue and Taxation Code section 5152 (attorneys' fees for recovery of a void assessment) and Code of Civil Procedure section 1021.5 (attorneys' fees for enforcement of an important right affecting the public interest) as authority for the award.

The district and ACCO appealed from the judgments against them. The Souzas cross-appealed, arguing that the district should not get a credit for amounts the Souzas might

collect from ACCO. In a separate appeal, the district seeks reversal of the Attorneys' fees award.[1]

DISCUSSION

I. Validity of the assessment

The district argues that even if it violated paragraph 21, the violation did not justify the trial court's invalidation of a statutorily authorized assessment. The question is one of law, so our review is de novo. (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1687; *Dawson v. East Side Union High School Dist.* (1994) 28 Cal.App.4th 998, 1041.)

We agree with the district. The assessment was properly levied pursuant to the Water Code, and there is no authority for the trial court's novel view that a landowner is entitled to avoid

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[1]On February 1, 2005, the Souzas filed a request that we take judicial notice of the agenda for the district's January 18, 2005, board meeting and of a district notice to landowners dated January 27, 2005. The documents pertain to changes in the district's regulations postdating the events at issue in this case. On July 22, 2005, the district filed a request that we take judicial notice of *Orff v. U. S.* (9th Cir. 1999) 358 F.3d 1137 and *Orff v. U. S.* (2005) 125 S.Ct. 2606. The Souzas filed an opposition to this request.

The material submitted by the Souzas may be judicially noticed pursuant to Evidence Code section 452, subdivisions (b) and (h). The cases submitted by the district must be judicially noticed pursuant to Evidence Code section 451, subdivision (a). Both requests are granted.

an otherwise valid assessment if a water district fails to follow an internal procedure.[2]

The power of a water district's board of directors to impose an assessment for unpaid water charges on the land where the water was used is established by the Water Code:

> "If authorized by the board of directors by resolution, [the assessor shall] add to the assessment of each parcel of land any charges for water and other services, or either, which are unpaid. The amount so added shall be collected and shall constitute a lien as a part of the assessment levied on the parcel upon which the water for which the charges are unpaid was used and upon the lands subject to the unpaid charges for any other services." (Wat. Code, § 36726, subd. (c).)

Water Code section 36825 reiterates that "any unpaid charges for water and other services added to the assessment under the provisions of Section 36726 are a lien on the land and impart notice of the lien to all parties."

Apart from the effect of paragraph 21, it is undisputed that the unpaid water charges were validly added to the assessment against the Souzas' land and became a lien against

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[2]The district also argues that, notwithstanding the mandatory language of paragraph 21 ("the General Manager shall require ..."), it had discretion to accept a guaranty that did not cover 12 months of service, and therefore it did not violate paragraph 21. Because of our decision, we need not consider whether this is correct.

the land pursuant to statute. The trial court's view was that the violation it found of paragraph 21 vitiated the addition of the charges to the assessment and vitiated the lien. Citing *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10, it stated that the district's regulations were quasi-legislative rules and had "the dignity of statutes." Therefore, the court ruled, the district "must adhere" to its regulations and "the failure to follow these rules is a violation of the law." Most important, the court ruled that the district "must follow its own rules *before levying assessments on plaintiffs' Farmland*." (Italics added.) Because it did not, the assessment was invalid.

Omitted from this rationale is an explanation why invalidating the assessment and ordering a refund is a proper remedy for the district's violation. The Water Code sections cited above provide simply that, if authorized by the district's board, unpaid water charges shall be added to the assessment on the land on which the water was used, shall be collected, and shall be a lien on the land. They do not provide that the validity of the assessment depends on whether the charges were incurred by an owner or a tenant or whether the district followed its procedures in attempting to obtain payment from a tenant before adding the charges to the assessment. The regulations also do not state or imply that following them is a precondition of the enforceability of the district's statutory rights against landowners.

Even if the district's regulations did purport to disable the district's statutory assessment powers in cases where the regulations were not followed, there is no authority for the view that any such self-imposed disability would be legally effective. Assuming the trial court was correct in characterizing the

regulations as quasi-legislative rules entitled to judicial deference and having the status of substantive law under *Yamaha Corp. of America v. State Bd. of Equalization, supra,* 19 Cal.4th 1, there is still no warrant for the view that the district can establish exceptions to its own statutory authority by making regulations and not following them.

The only authorities cited by the trial court in support of its view that the district's violation of paragraph 21 deprived it of its statutory power to assess the unpaid charges against the land are Government Code section 15606 and *Main & Von Karman Associates v. County of Orange* (1994) 23 Cal.App.4th 337, 342. The Souzas' brief cites no authority at all for the view that the district's violation of paragraph 21 forfeited its right to add the unpaid water charges to the assessment on the land.

In any event, neither authority is much help to the Souzas' case. The parts of Government Code section 15606 cited by the court provide that the State Board of Equalization shall "[p]rescribe rules and regulations to govern local boards of equalization when equalizing, and assessors when assessing" and that "[t]his section is mandatory." As no rules promulgated by the State Board of Equalization are at issue in this case, we see no relevance to these provisions. Even assuming, as the court asserted, that paragraph 21 is "analogous" to rules promulgated by the State Board of Equalization in that it is binding on the district, the fact that a rule is binding on a government entity does not, by itself, mean that a citizen, taxpayer, or property owner has a right to any particular remedy if the rule is violated.

Main & Von Karman Associates v. County of Orange, supra, 23 Cal.App.4th 337 involved a county assessor's use of an

incorrect valuation method when assessing property taxes. The assessor used a valuation method known as the comparable sales method to determine the value of a commercial property. Rule 4 of the State Board of Equalization required assessors to make certain adjustments to valuations computed by that method. The adjustments were not made. (*Id.* at pp. 340-341.) The owner appealed the assessment to Assessment Appeals Board No. 1 for Orange County, which affirmed the assessor on the issue of methodology. (*Id.* at pp. 340, 341-342.) The Superior Court denied the owner's petition for a writ of mandate. (*Id.* at p. 342.) Reversing, the Court of Appeal held that rule 4 was mandatory. (*Id.* at. pp. 342-343.) It directed that the case be remanded to the Assessment Appeals Board for further hearings consistent with the rule. (*Id.* at p. 344.) The case stands only for the well-settled proposition that if an assessor calculates property taxes using the wrong method, the taxpayer is entitled to an order directing that the taxes be recalculated using the right method. It does not support the notion that an assessment against land for unpaid water charges is invalid because the water district broke a rule requiring it to take certain steps to secure payment from a tenant of the land's owner.

In sum, the trial court relied on a non-sequitur. The charges may have gone unpaid by the tenants partly because the district failed to follow mandatory internal procedures, but that does not suspend the district's statutory authority to levy an assessment for unpaid charges on the land where the water was used.

We recognize the public policy considerations implicated by the trial court's decision in this case. We may take judicial

notice of the fact that, without irrigation, Westlands Water District would be a dry place:

> "The Westlands area receives only about seven inches of rainfall per year, primarily during the winter months. No dependable source of surface water is found nearby, and the groundwater supply is insufficient and of poor quality. As a result, the District must rely on irrigation with imported water to make the lands agriculturally productive." (Wilson, *Westlands Water District and Its Federal Water: A Case Study of Water District Politics* (1988) 7 Stan. Envtl. L.J. 187, 189, fn. omitted.)

Whether they farm their land or lease it, landowners depend on the functioning of the district to confer economic value on their holdings. In an early case upholding a new irrigation district law and its assessment provisions, the California Supreme Court recognized that the law promoted the common good:

> "[The law] has for its main object the utilizing and improvement of vast tracts of arid and unfruitful soil, desert-like in character, much of it, which, if water in sufficient quantity can be conducted upon and applied to it, may be [placed under cultivation]. Such a general scheme, by which immigration may be stimulated, the taxable property of the state increased, the relative burdens of taxation upon the whole people decreased, and the comfort and advantage of many thriving communities subserved, would seem to redound to the common advantage of all the people of the state, to a greater or less extent." (*Turlock Irrigation Dist. v. Williams* (1888) 76 Cal. 360, 368-369.)

Like any other entity, the district must be financially viable in order to function, and its ability to collect water charges is obviously crucial to its financial viability. Paragraph 21 allows the district to take steps to ensure payment by delinquent water users while minimizing the need to resort to assessments. The trial court converted the district's failure to fully implement this benign measure in this case into the basis for a new inroad, unsupported by any authority, on water districts' assessment powers. The right to levy assessments is at the foundation of a water district's statutory authority as a governmental entity and of its ability to obtain payment for its services. These observations are not necessary to augment the reasons for reversal set forth above. They do, however, illustrate the negative consequences that could flow from allowing the trial court's decision to stand.

We hold that the evidence failed as a matter of law to prove an invalid assessment. Because of this conclusion, we need not address the district's contention that the court erred in allowing the Souzas to amend their complaint to add that claim.

II. Breach of contract

The district challenges the trial court's ruling that the district breached the water agreement between it and the Beebowers by violating paragraph 21, and that the Souzas were entitled to recover for that breach as third-party beneficiaries. We agree with the district.

"Generally, it is a question of fact whether a particular third person is an intended beneficiary of a contract," which we review under the substantial evidence standard. (*Prouty v. Gores*

Technology Group (2004) 121 Cal.App.4th 1225, 1233.) If, however, as here, the issue is presented to the court on the basis of undisputed facts and uncontroverted evidence and only a question of the application of the law to those facts need be answered, our review is de novo: "[W]here ... the issue [of whether a third party is an intended beneficiary] can be answered by interpreting the contract as a whole and doing so in light of the uncontradicted evidence of the circumstances and negotiations of the parties in making the contract, the issue becomes one of law that we resolve independently." (*Ibid.*)

"'The test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract. [Citation.] If the terms of the contract necessarily require the promisor to confer a benefit on a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person. The parties are presumed to intend the consequences of a performance of the contract.' [Citation.]" (*Prouty v. Gores Technology Group, supra,* 121 Cal.App.4th at p. 1232.) A party need not show that it was intended to benefit as an individual and may prevail by showing that it is a member of a class the parties intended to benefit. (*Ibid.*) At the same time, it is not enough that the third party would incidentally have benefited from performance. (*Martinez v. Socoma Companies, Inc.*. (1974) 11 Cal.3d 394, 406; *Bancomer S. A. v. Superior Court* (1996) 44 Cal.App.4th 1450, 1459.) "The circumstance that a literal contract interpretation would result in a benefit to the third party is not enough to entitle that party to demand enforcement. The contracting parties must have intended to confer a benefit on the

third party." (*Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 348.) In determining whether the contract contemplates a benefit to the third party, the court must read the contract in light of the circumstances in which the parties entered into it. (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 437.)

The trial court's ruling misapplied the third-party-beneficiary doctrine. First, the doctrine presupposes that the defendant made a promise which, if performed, would have benefited the third party. "'Where one person for a valuable consideration engages with another to do some act for the benefit of a third person ... the party for whose benefit the contract or promise was made, or who would enjoy the benefit of the act, may maintain an action against the promisor for breach of his engagement.'" (*Prouty v. Gores Technology Group, supra,* 121 Cal.App.4th at p. 1232.) But the water agreement contains no promise or engagement by the water district to follow paragraph 21 or any other regulation. It is true, as the statement of decision notes, that the water agreement incorporates "as though set forth at length" the Terms and Conditions for Agricultural Water Service and the Regulations for the Allocation of Agricultural Water, which include paragraph 21. A fuller quotation of the same passage, however, shows that the agreement provides as follows:

> "Beebower Farms, herein referred to as 'Water User,' hereby applies for agricultural water for the March 2000-February 2001 Water Year and agrees, as a condition of the allocation and furnishing of any agricultural water during that water year and in accordance with the District's Regulations, as follows: [¶] ... [¶] To comply

> with the Terms and Conditions for Agricultural Water Service and the Regulations for the Allocation of Agricultural Water, copies of which will be furnished upon request, both of which are incorporated herein as though set forth at length."

This provision commits *only the water user* to comply with the district's regulations. The district does *not* promise the water user that it will follow its internal procedures in this or any other provision of the agreement. Further, with respect to paragraph 21, there are no grounds for *inferring* a mutual promise, because paragraph 21 only imposes a burden on the water user (advance payment or a guaranty of payment). The water user has no interest in obtaining the water district's promise that it will impose that burden. The district, likewise, had no need to include in the agreement its own promise to do what is in its own interest—no reason, in other words, to make the promise to itself.

If a contract is to be a basis of liability for the district's violation of paragraph 21—a basis independent of the theory that the district cannot levy an assessment unless it follows its own rules—it must be a contract in which the district promises to abide by paragraph 21. The water agreement does not contain that promise.

Second, even if the district had promised the Beebowers that it would follow paragraph 21, there is no evidence in the record that the Beebowers had any intent that the promise would

benefit the Souzas. The trial court relied on evidence that *the district* intended landowners to benefit from paragraph 21,[3] but that was not the correct inquiry. The point of the third-party-beneficiary doctrine is to allow a third party to enforce, against a promisor, rights running to the third party for which the *promisee* bargained. The promisor's intent is not at issue (although its knowledge of the promisee's intent may be [see *Martinez v. Socoma Companies, Inc., supra*, 11 Cal.3d at p. 401]). Corbin

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[3]The court mentioned two purported pieces of evidence of the district's intent to benefit landowners: First, paragraph 22 of the Terms and Conditions for Agricultural Water Service augments paragraph 21 by permitting the district to impose advance payment or other conditions on a water user if it determines that the user's actions "create a financial risk or hardship for the District or its landowners." Second, a letter from the district to the Beebowers dated January 7, 2000, stated that the requirement of advance payment or a guaranty was being imposed pursuant to rules established "in order to protect the District, its water users, and landowners." The Souzas' brief mentions a third purported piece of evidence on this issue: testimony by William Johnston, an engineering consultant for the district. Johnston testified that at one time, the district used "landowner cards" to obtain owners' acknowledgements that they were statutorily required to pay for water if their tenants defaulted. At "[a]bout the same time" that the district adopted the paragraph 21 procedure, it stopped using the cards.

states: "In third party cases, the right of such party does not depend upon the purpose, motive, or intent of the promisor." (9 Corbin on Contracts (2002) § 776, p. 14.)

Third, the Souzas were neither donee beneficiaries nor creditor beneficiaries and therefore cannot recover as third-party beneficiaries at all. The law's focus on the intent of the promisee to secure a benefit for the third party is reflected in the traditional division of third-party beneficiaries between donee beneficiaries and creditor beneficiaries. This division appears in section 133 of the Restatement First of Contracts and has been embraced by California courts. (See, e.g., *Martinez v. Socoma Companies, Inc., supra,* 11 Cal.3d at p. 400; *Outdoor Services, Inc. v. Pabagold, Inc.* (1986) 185 Cal.App.3d 676, 681.) Section 302 of the Restatement Second of Contracts eliminated the terms "donee" and "creditor" but retained the same concepts under new descriptions. (See 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 687, pp. 773-774.) As will be seen in the following discussion, both types of beneficiaries derive their status from an intent or obligation of a promisee to benefit them. The lack of such an intent or obligation on the part of the promisee defeats the third party's claim.

A donee beneficiary is a party to whom a promisee intends to make a gift (i.e., a benefit the promisee had no duty to confer) of a promisor's performance. An example is the plaintiff in *Gourmet Lane, Inc. v. Keller* (1963) 222 Cal.App.2d 701. There, the plaintiff, an incorporated association, sued one of its members for failing to bear a share of certain costs, as the member had agreed to do in an agreement among all the members pursuant to which the association was incorporated. (*Id.* at

pp. 702-704.) The Court of Appeal affirmed a ruling that the corporation could recover as a third-party beneficiary: It was a donee whom the other members intended to benefit by obtaining the promise of payment from the defendant member. (*Id.* at pp. 704-706.) The Souzas were not donee beneficiaries: There is no evidence of any intent on the Beebowers' part to give them anything as a gift.

A creditor beneficiary is a party to whom a promisee owes a preexisting duty which the promisee intends to discharge by means of a promisor's performance. *Wilson v. Anderson* (1962) 208 Cal.App.2d 62 is an illustration. In that case, landowners entered into a contract with broker A to find a buyer for their ranch, but then actually sold the ranch through broker B. Before the sale, the owners and broker B entered into an oral agreement under which B would pay one-third of his commission to A. When B refused to pay A, A sued as a third-party beneficiary of the oral agreement between B and the owners. Affirming a judgment for A, the Court of Appeal stated that A was a creditor beneficiary of the oral agreement. The preexisting obligation between A and the owners was the original brokerage contract between them. (*Id.* at pp 63-64.)

In this case, the Beebowers did have a preexisting obligation to the Souzas because the lease required the Beebowers to pay the water bill. A promise by the district (if there had been one) to enforce paragraph 21 against the Beebowers, however, could not be construed as a promise by the district to fulfill the Beebowers' lease obligation to pay the water bill. The district's putative promise would be a promise to compel *the Beebowers* to pay the bill or ensure its payment—not

a promise to pay the bill *for* the Beebowers. We are aware of no case in which a third-party-beneficiary contract was formed when a promisee bargained for and obtained a promisor's engagement to force the promisee to satisfy its own obligation to the third party. The Souzas would not be creditor beneficiaries of the water agreement even if it had contained a promise by the district to enforce paragraph 21 against the Beebowers. Consequently, the Souzas were neither donee nor creditor beneficiaries. These are the only two kinds of intended third-party beneficiaries, so the Souzas were not intended third-party beneficiaries at all. (See *Martinez v. Socoma Companies, Inc., supra,* 11 Cal.3d at pp. 400-403, 407 [plaintiffs who were neither creditor nor donee beneficiaries were not third-party beneficiaries].)

Next, by awarding the Souzas a refund, the trial court violated the rule that a third-party beneficiary may not obtain a greater recovery than that which would have been available to the promisee. (*Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal.App.3d 122, 132.)

> "A third party beneficiary cannot assert greater rights than those of the promisee under the contract. [Citation.] Because the foundation of any right the third person may have is the promisor's contract, '[w]hen [a] plaintiff seeks to secure benefits under a contract as to which he is a third-party beneficiary, he must take the contract as he finds it.... [T]he third party cannot select the parts favorable to him and reject those unfavorable to him.' [Citation.]" (*Marina Tenants Assn. v. Deauville Marina Development Co., supra,* 181 Cal.App.3d at p. 132.)

Even if the water agreement contained a promise by the district to enforce paragraph 21, the Beebowers could not conceivably have obtained any recovery for a breach of that promise. The contract required the Beebowers to pay for the water. There is no imaginable scenario under which a failure of the district to enforce paragraph 21 could result in relief for the Beebowers from having to pay for water they used. By relying on the district's supposed promise to follow paragraph 21 while ignoring the Beebowers' obligation to pay for the water, the Souzas seek to "'select the parts [of the agreement] favorable to [them] and reject those unfavorable to [them].'" (*Marina Tenants Assn. v. Deauville Marina Development Co., supra,* 181 Cal.App.3d at p. 132.) The third-party-beneficiary doctrine does not allow this.

Finally, the Souzas cannot recover on the water agreement as third-party beneficiaries because the promisees—the Beebowers—undisputedly breached the agreement and were liable to the promisor—the district—for an amount equal to the amount the Souzas paid. If the promisee breaches the contract, and the damages to the promisor equal or exceed the amount of the benefit the promisor was to confer on the third party, the third party cannot recover. (*Votaw Precision Tool Co. v. Air Canada* (1976) 60 Cal.App.3d 52, 56.) The Beebowers' nonpayment damaged the district in an amount equal to the amount the Souzas claim the enforcement of paragraph 21 would have saved them (the unpaid amount and the amount the Souzas had to pay being the same, of course), so the Souzas cannot recover any refund.

None of the remaining arguments and considerations in the statement of decision on this issue are persuasive. The court stated that the Souzas must be intended and not incidental beneficiaries of the water agreement and that paragraph 21 "would explicitly benefit" them if followed because it would prevent unpaid charges from accruing and therefore would avoid any assessment for unpaid charges. That the Souzas would as a matter of fact benefit would not be enough to show they were intended third-party beneficiaries even if the water agreement contained the district's promise to follow paragraph 21. Without more, a party who simply will receive a benefit from performance is only an incidental beneficiary.

The court also stated that "it is clear that *only* the plaintiffs could benefit from Westlands implementing the advance payment requirements on Beebower." Further, "it is difficult to see who else would benefit" from this, because the unpaid charges could not be transferred to other landowners in the district. Even assuming it is true that the district never passes its bad debt expenses on to its customers (though the court supplied no reason to believe this, and it is hard to see how those expenses could be covered otherwise), the court's conclusion does not follow. Paragraph 21 plainly is designed to benefit the district itself. Like any other business entity, it benefits from self-protective measures taken against customers who present credit risks. The fact that the district has another remedy in its power to assess the charges against the land does not show that it needs no other protection. That remedy involves costs and delays the district has an interest in avoiding. Consequently, there is no need to assume the Souzas were intended to benefit because

otherwise paragraph 21 would not benefit anyone. Further, that assumption has the untenable consequence that in cases where the delinquent customer *is* the owner, the rule has no purpose at all and protects no one. (Presumably, no one would argue that the owner can invoke paragraph 21 to avoid payment in *that* situation.)

Finally, the trial court's reliance on *Zigas v. Superior Court* (1981) 120 Cal.App.3d 827 is misplaced. That case involved a contract between landlords and the United States Department of Housing and Urban Development, pursuant to which the government insured a mortgage on an apartment building purchased by the landlords. In return, the landlords agreed, among other things, to limits on the rents they would charge tenants. The tenants sued the landlords, claiming they were overcharged. (*Id.* at pp. 830-831.) The Court of Appeal held that the tenants could sue on the contract as third-party beneficiaries. Based on a review of the underlying statutes, it concluded that the point of the contract was to provide a benefit to the tenants of the building. Further, the landlords' promise to comply with the rent caps "could *only* benefit the tenants." (*Id.* at pp. 835-836.) Nothing similar is at issue here. Paragraph 21 is a measure to protect the district from credit risks, not a benefit program for landowners. And as we have just explained, the Souzas are not the only parties who could benefit from paragraph 21, as the district itself benefits and the benefit to the district is the point.

Zigas and the present case are disanalogous in other important ways as well. In *Zigas*, the third parties sought to enforce a promise the landlords (the promisors) made to the

government (the promisee) and which the promisee intended to benefit the third parties. In this case, the third parties sought to enforce a promise the district did *not* make to the Beebowers which, even if it had been made, was not shown by any evidence to be intended by the promisees (the Beebowers) to be for the benefit of the third parties.

In sum: The water agreement contained no promise by the district that would have benefited the Souzas if performed. If it had, there was still no evidence in the agreement that the promisees (the Beebowers) intended the Souzas to benefit from it. If there had been a promise and the promisees had intended the Souzas to benefit from it, third-party recovery of a refund for water charges would still be barred because no recovery by the promisees would have been possible and because the promisees were in breach. For all these reasons, the trial court erred in allowing the Souzas to recover for breach of contract on a third-party-beneficiary theory.

III. Equal protection

As part of their cross-appeal, the Souzas argue that the addition of the water charges to the assessment on their land violated their constitutional right to equal protection of the laws. Therefore, they contend, even if the trial court erred in finding for them on the theories discussed above, the judgment should be affirmed. The district contends that we should refuse to reach this constitutional issue because the Souzas did not raise it before the trial court, even though they did raise a related issue of statutory interpretation. We agree with the district's view.

In their trial brief, the Souzas argued that Water Code section 36726 (quoted in part I above) "does not by its express terms permit" the district to add a tenant's unpaid water charges to the assessment on the land—i.e., it states simply that a district may add unpaid charges for water used on the land, without asserting or denying that there is an exception for water used by a tenant—and therefore the provision is "ambiguous." The Souzas urged the trial court to resolve the purported ambiguity by referring to Water Code section 37212. Section 37212 is within part 7.5 of division 13 of the Water Code, which "provides an alternative method for the levy, collection and enforcement of district assessments ...." (Wat. Code, § 37200.) Any water district may elect to proceed under part 7.5 for the levy of its assessments. (Wat. Code, § 37203.) If a district elects to proceed under part 7.5, the board of supervisors of the county in which the district or a part of the district is located levies and collects assessments, including add-on assessments for unpaid water charges, on behalf of the district. (Wat. Code, §§ 37207, 37212.) Unlike section 36726—which applies to districts that (like Westlands) have not elected to proceed under part 7.5—section 37212 provides for add-on assessments for unpaid water charges only where water services were "requested in writing by the owner of the property ...." (Wat. Code, § 37212, subd. (a)(1).) The Souzas argued that the same limitation should be read into section 36726.

The trial court rejected this argument in a mid-trial ruling. It stated:

> "Contention is made that Water Code section 36726 ... subdivision (c)[,] under which

> this assessment was made[,] ... was ambiguous and should be read in connection with other code sections .... It's my conclusion that Water Code section 36726(c) is unambiguous on its face and clearly in my view allows assessments against the whole parcel of land .... While it does not make specific reference to a landlord, it is clear that a parcel of land contemplates an owner of some kind, and I think that -- and I will say this, the argument made by the plaintiffs in this case was extremely inventive, and I mean that sincerely, not in any sense sarcastically at all. It's something that wouldn't even have occurred to me, and I understand the argument, but I think that the code section itself, the charge ultimately goes to the parcel of land it seems to me and it's not unclear to me as I read it, so ... that's my ruling on that."

Now the Souzas contend that their right to equal protection of the laws was violated because a similarly situated landowner in a district that used the county for levying assessments would only have had to pay a delinquent tenant's bill if the owner had requested water service in writing. There is no rational basis, they contend, for the difference in treatment. To avoid the necessity of invalidating Water Code section 36726, they further argue, we should construe that section as if it also contained a request-in-writing requirement.

This is a distinctly different issue from the one the Souzas raised in the trial court. The original argument was that section 36726 was ambiguous and the court should use

section 37212 to resolve the ambiguity. The new argument is that section 36726 is unconstitutional if read literally and should be read as if it were the same as section 37212 to save it from invalidation.[4]

The Souzas are not entitled to raise the new issue for the first time on appeal. They argue that we may reach the issue even if it was not raised in the trial court because it presents a pure question of law.[5] There is no rule, however, that an appellate court *must* consider a pure question of law raised for the first time on appeal. Instead, the decision to do so or not "is largely a question of the appellate court's discretion." (*Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167.) Here, we are dealing not with an erroneous ruling to which no objection was raised, but with an entire substantive theory of the defendant's liability—unconstitutionality of the operative statute—that was not litigated at all in the trial court. Further, "we have an obligation to avoid deciding constitutional

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[4]To the extent the Souzas' brief can be interpreted as *also* renewing the ambiguity argument the trial court rejected, we agree with the trial court's view. Water Code section 36726, subdivision (c), authorizes an add-on assessment and a lien on "the parcel upon which the water for which the charges are unpaid was used ...." The assessment and lien are upon the land. The absence of an exception for tenant-occupied land is not an ambiguity.

[5]They also argue that their trial brief did raise "the constitutionality of these statutes," and they cite a page of their trial brief. The cited page, however, says nothing about equal protection. The only hint of a constitutional issue on the page is a parenthetical reference to "due process rights," accompanied by no argument or citation of authority of any kind.

questions unless it is absolutely necessary to do so." (*City of Huntington Park v. Superior Court* (1995) 34 Cal.App.4th 1293, 1299.) For these reasons, we decline to reach the equal protection issue.

IV. Governmental immunity

Because of the conclusions reached above, we need not discuss the district's argument that the Souzas' contract and invalid assessment claims should have been barred by governmental immunity.

V. Guaranty

The trial court ruled that the Souzas could recover against ACCO on the guaranty as third-party beneficiaries for the same reasons the Souzas could recover against the district on the water agreement as third-party beneficiaries: Paragraph 21 was intended to benefit the Souzas, so the guaranty, given pursuant to paragraph 21, must also have been intended to benefit them. This analysis would be erroneous even if the court's ruling on the water agreement was not. The water agreement and the guaranty are different contracts with different parties. The meaning of the guaranty and the intent of its parties cannot be inferred from the meaning of the water agreement and the intent of its parties. An independent analysis of the guaranty is necessary.

The Souzas propose an independent analysis in their brief. They assert that the district is the promisee, and acknowledge that Dave Ciapponi, who signed ACCO's guaranty letter on behalf of the district, did not testify that he had any intent that the Souzas would benefit by ACCO's performance. But they argue that Ciapponi's intent is irrelevant because he was not involved in

negotiating the guaranty. Then they contend that the promisee's purpose must be "determined by analyzing the purpose for which the guarantee was given ...." This analysis in turn shows that the Souzas were intended beneficiaries because "a benefit to the landowner is inherent in the acceptance of a guarantee itself."

We reject this analysis also. Two considerations invalidate the judgment for the Souzas on the guaranty.

First, the Souzas could not recover as third-party beneficiaries as a matter of law. If, as the Souzas argue, ACCO was the promisor, the district was the promisee, and the district intended ACCO's promise to benefit the Souzas, then the Souzas were entitled to enforce ACCO's performance, but could assert no greater rights than the district could. (*Marina Tenants Assn. v. Deauville Marina Development Co., supra,* 181 Cal.App.3d at p. 132.) The district, however, could recover nothing from ACCO because it had already received full payment from the Souzas. The creditor in a suretyship[6] relationship—here, the district—cannot recover against the surety if it has already recovered the full amount of the debt from another source. "The creditor is entitled to only one performance, and if the creditor receives that by payment or other satisfaction, the surety is discharged." (23 Williston on Contracts (4th ed. 2002) § 61:11, p. 39.)

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[6]A guarantor is a surety. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 1002, p. 1095.)

This principle was applied in *John P. Mills Organization v. Unger* (1932) 215 Cal. 308, in which the Supreme Court considered a surety bond provided by a purchaser of land to the seller. The seller lent the purchase price to the purchaser and the purchaser agreed to build houses to certain specifications on the land. When the purchaser failed to build as specified and defaulted on the loan, the seller re-purchased the land at a trustee's sale for the full amount of the purchaser's indebtedness. Then it sued the surety to recover on the bond. (*Id.* at pp. 309-310.) Reasoning that if the purchaser had paid off the loan the seller would be entitled to nothing more—even if the purchaser had also failed to build as promised—the Supreme Court held that the trustee's sale satisfied the purchaser's obligation in full. As a result, there was no debt left for the bond to cover, and the surety was discharged. (*Id.* at pp. 310-311; see also *LeFlore v. Grass Harp Productions, Inc.* (1997) 57 Cal.App.4th 824, 828-830, 840 [guarantor discharged when principal satisfied obligation to creditor].)

Because the district, having been paid in full, was in no position to collect any more money on the guaranty, its alleged third-party beneficiaries, the Souzas, could not do so either. It makes no difference that it was the Souzas themselves who paid the district. "Payment by a third person does not change the result. If the third party wishes to keep the obligation alive, that party must buy the obligation, not pay it." (23 Williston, *supra,* § 61:11at p. 41.) In other words, the only way the Souzas could have avoided discharging the guaranty when they paid the water charges would have been to ask the district to assign its claim against ACCO to them first.

The second reason the Souzas cannot recover on the guaranty as third-party beneficiaries is that there was no substantial evidence that the promisee intended the Souzas to be beneficiaries. As the Souzas' brief acknowledges, the extrinsic evidence (Ciapponi's testimony) provides no support for their position, and they must rely on the terms of the guaranty itself, as expressed in the letter from ACCO signed by the district and the Beebowers. The Souzas' brief states: "The only relevant evidence presented at trial was the plain language of the Water Agreement...." But the letter does not identify the Souzas, individually or as part of a class of intended beneficiaries, and does not purport to confer any benefit on them. It is insufficient to observe, as the Souzas do, that they would inevitably benefit from performance of the guaranty because they were secondarily liable for the debt. The Souzas have cited no authority, and we know of none, supporting the notion that every party on whom the burden to pay a debt will fall if a contract to pay it is breached is necessarily a third-party beneficiary of that broken contract. In short, the evidence was sufficient to establish no more than that the Souzas were incidental beneficiaries of the guaranty.[7]

The trial court erred in ruling that the Souzas could recover on the ACCO guaranty as third-party beneficiaries. In view of this, it is unnecessary to discuss ACCO's argument that it did not breach the guaranty agreement.

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[7]The Souzas' claim in their cross-appeal that the district should not get an offset for payments by ACCO is mooted by our holding.

VI. Attorneys' fees and costs

Because we hold that the court erred in entering judgment for the Souzas, we need not consider the district's arguments about why the grounds the court relied on in awarding attorneys' fees and costs do not support the award. Instead, the award of attorneys' fees and costs is reversed because the Souzas are not prevailing parties.

VII. Conclusion

Water Code section 36726, subdivision (c), is a simple law. It permits a water district to add unpaid water charges to an assessment on the land where the water was used. Where the district chooses to do this, the law makes the owners of the land responsible for the unpaid charges. Nothing that happened in this case relieved the Souzas of that responsibility.

DISPOSITION

The judgments in favor of the Souzas against the district and ACCO and the award of attorneys' fees are reversed. The Souzas' cross-appeal is dismissed as moot. Costs are awarded to appellants.

/s/ Wiseman
Wiseman, J.

WE CONCUR:

/s/ Vartabedian
Vartabedian, Acting P.J.

/s/ J. Gomes
Gomes, J.

California Water Code Section 36726. Computation; water and service charges; filing

Within 10 days after the assessment is completed, the assessor shall do each of the following:

(a) Compute and charge in the proper part of the assessment book in a place provided therefor in the record of each parcel of land assessed the assessment due on the parcel.

(b) In the event the annual assessment for any parcel of land separately assessed, computed pursuant to (a) above, is less than two dollars ($2), a minimum annual assessment may be set by the board which shall not exceed two dollars ($2) for each separately assessed parcel of land, and upon such a determination the assessor shall enter that assessment for each separately assessed parcel of land for which the annual assessment is less than the amount set by the board.

(c) If authorized by the board of directors by resolution, add to the assessment of each parcel of land any charges for water and other services, or either, which are unpaid. The amount so added shall be collected and shall constitute a lien as a part of the assessment levied on the parcel upon which the water for which the charges are unpaid was used and upon the lands subject to the unpaid charges for any other services.

(d) File each separate part of the assessment book with the tax collector of the district.

(Added by Stats.1951, c. 390, p. 1218, § 1. Amended by Stats.1955, c. 207, p. 676, § 4; Stats.1965, c. 730, p. 2135, § 2.)

California Water Code Section 36832. Refund of assessments, penalties or costs

On order of the board any assessments, penalties or costs thereon, or portions thereof, shall be refunded by the treasurer if they were either:

(a) Paid more than once.

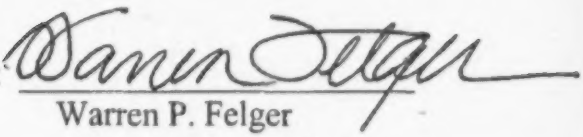
(b) Erroneously or illegally collected.

(Added by Stats.1959, c. 2041, p. 4722, § 10.)

Respectfully submitted,

FELGER & ASSOCIATES,

Dated: July 21, 2006.

By: 

Warren P. Felger
Attorneys for Petitioners

(2)

No. 06-120

FILED
AUG 23 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

TILVA L. SOUZA, WILLIAM R. SOUZA, JOE O. SOUZA, JR., ROBERT J. SOUZA and CAROL DROBNY,

Petitioners,

vs.

WESTLANDS WATER DISTRICT and ACCO FINANCE CO., INC.,

Respondents.

OPPOSITION AND RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

PROOF OF SERVICE FOR OPPOSITION AND RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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The undersigned hereby certifies as follows:

I am a lawyer duly licensed to practice law in the State of California. I am also a member, in good standing, of the Bar of the Supreme Court of the United States. My business address is Law Offices of McKinley & Associates, 25129 The Old Road, Suite 307, Stevenson Ranch, CA 91381-2278. I am the attorney for the Respondent ACCO Finance Co.

On August 23, 2006, I served three copies of the Respondent's Opposition and Response to Petition For Writ of Certiorari on the parties to this action by placing them in a sealed Federal Express container and depositing them in a Federal Express receptacle at Stevenson Ranch, CA, addressed as follows:

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Said Federal Express delivery is paid by me when I receive an invoice therefor from Federal Express, charged to my Federal Express account.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Dated: August 23, 2006

Robert D. McKinley

(3)

Supreme Court, U.S.
FILED
AUG 30 2006
OFFICE OF THE CLERK

No. 06-120

In The Supreme Court of the United States

TILVA L. SOUZA, WILLIAM R. SOUZA, JOE O. SOUZA, JR., ROBERT J. SOUZA and CAROL DROBNY,

Petitioners,

vs.

WESTLANDS WATER DISTRICT and ACCO FINANCE CO., INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED[1]

1. Whether Petitioners have presented compelling reasons to grant the Petition where Petitioners do not claim that a state court of last resort has decided an important federal question in a way that conflicts with a decision of another state court of last resort or of a United States court of appeal; as Petitioners failed to present in the lower courts the threshold Constitutional issue of violation of due process other than by a single parenthetical reference in their trial brief to "due process rights," unaccompanied by argument or citation of authority of any kind and thus, the Constitutional issue was never decided.

2. Whether Petitioners have presented compelling reasons to grant the Petition where Petitioners do not claim that the Court of Appeal of California, Fifth Appellate District, has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with the relevant decisions of this Court; as Petitioners failed to present in the lower courts the threshold Constitutional issue of violation of due process other than by a single parenthetical reference in their trial brief to "due process rights," unaccompanied by argument or citation of authority of any kind and thus, the Constitutional issue was never decided.

3. Whether Petitioners have presented compelling reasons to grant the Petition, where the California Supreme Court denied without comment Petitioners' Petition for Review of the Court of Appeal of California, Fifth Appellate District's

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[1]Petitioners' "Questions" bear little resemblance to the issues actually raised by the record and decided by the lower courts. Respondent therefore restates the questions presented by this case.

opinion, reversing the Superior Court's judgment and holding that Westlands Water District properly levied an assessment pursuant to the California Water Code and Petitioners were not entitled to avoid an otherwise valid assessment even if a water district failed to follow an internal procedure.

PARTIES TO THE PROCEEDINGS BELOW

The plaintiffs below are petitioners Tilva L. Souza, William R. Souza, Joe O. Souza, Jr., Robert J. Souza and Carol Drobny, individuals.

A defendant below is respondent Westlands Water District, a California water district and public agency of the State of California under California Water Code sections 34000, et seq.

A defendant below is ACCO Finance Company, a Delaware Corporation.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Westlands Water District states that it is a California Water District and Public Agency of the State of California under California Water Code sections 34000, et seq. Therefore, no stock in Westlands Water District exists which would be available for ownership by any parent corporations or publicly held companies.

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STATUTES INVOLVED

USCS Const. Amend. 14, §1

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U. S. C. §1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title,

right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

STATEMENT OF THE CASE

I. Statement of Facts

For at least 25 years the Petitioners have farmed or leased real property located in an area served by Westlands. (RT p. 199:8-22[2]) On February 28, 1999, the Petitioners leased their property to Forrest and Edna Beebower, dba Beebower Farms ("Beebower") for a three-year term. (CT Vol. 1 of 3, pp. 14-24) The lease, to which Westlands was not a party, provided that Beebower was responsible for all assessments for water allocations and for all water services supplied to the property. (CT Vol. 1 of 3, p. 15, ¶7) Westlands is a public agency. Water Code § 37823. Westlands provided irrigation water to Beebower under an Agricultural Water Application and Water User Purchase Agreements between Beebower and Westlands for water years 1999/2000 and 2000/2001. ("Water Agreement" CT Vol. 1 of 3, pp. 25-28, 46-47) Because of Beebower's delinquent payments in the 1999/2000 water year, pursuant to its Regulations for the Allocation and Use of Agricultural Water Within the Westlands Water District

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[2]The Clerk's Transcripts on Appeal are comprised of 4 sets, separately bound as follows: Volumes 1-3, numbered as pp. 1-300 (Vol. 1), 301-600 (Vol. 2), and 601-662 (Vol. 3); Volumes 1-2, numbered as pp. 0001-0300 (Vol. 1) and 0301-0359 (Vol. 2); Supplemental Volume 1, numbered as pp. 1-91; and Supplemental Volume 1, numbered as pp. 1-85. Reference is made herein to the Clerk's Transcripts on Appeal as "CT Vol. ___ of ___, p. ___" and to the Clerk's Supplemental Transcripts on Appeal as "SCT. p. ___of ___."

The Reporter's Transcripts on Appeal are comprised of 4 Volumes, consecutively numbered as pp. 1-271 (Vol. 1); 272-495 (Vol. 2); 496-788 (Vol. 3); and 789-1039 (Vol. 4). Reference is made herein to the Reporter's Transcript on Appeal as "RT p. ___."

("Regulations" CT Vol. 1 of 3, pp. 146-153) and the Terms and Conditions for Agricultural Water Service ("Terms and Conditions" CT Vol. 1 of 3, pp. 138-145), Westlands required Beebower to either pay estimated water charges in advance, or to secure a guarantee for delinquent water charges from a recognized financial institution. ACCO Finance Company ("ACCO") provided Westlands a Guarantee dated April 3, 2000 (SCT p. 8 of 91), for the guaranteed payment of delinquent amounts owed to Westlands on the Beebower Water User Account.

The Guarantee provided that ACCO would pay Westlands for any delinquent water charges after April 3, 2000 in an amount up to $98,306.00 upon Westlands providing ACCO copies of unpaid invoices within 10 days of any delinquency. The ACCO Guarantee dollar amount, at the time of acceptance, appeared to Westlands to be more than sufficient to cover the estimated charges that could accrue to Beebower's Water User Account based upon the allocated acre feet of water remaining in Beebower's Account at that time, multiplied by the estimated cost of the water (RT pp. 766:13-768:16; CT Vol. 1 of 3, p. 208). Dave Ciapponi, Westlands' Assistant General Manager, signed the ACCO Guarantee. (SCT p. 8 of 91)

In late August 2000, Beebower exceeded his water allocation and on August 26, 2000, his account again became delinquent. (RT pp. 502:11-511:4; CT Vol. 1 of 3, p. 197) Beebower became further delinquent again on September 29, 2000. (RT pp. 504:24-505:1) Westlands demanded payment from ACCO under the Guarantee. (SCT p. 33 of 91) On or about October 11, a final payment from ACCO was received. (SCT p. 34 of 91) That payment was insufficient to cover the water used by Beebower between August 26, 2000 and September 29, 2000. (SCT p. 34 of 91) On October 11, 2000,

Westlands sent a letter to ACCO requesting that ACCO pay the additional amount Westlands believed was still due under the Guarantee. (SCT p. 34 of 91) ACCO did not pay the additional amounts demanded by Westlands on October 11, 2000. (RT p. 731:4-22)

In May 2001, assessments consisting of unpaid water charges in excess of the ACCO Guarantee, penalties and interest, were levied upon the Petitioners' real property pursuant to California Water Code section 36729. (CT Vol. 1 of 2, pp. 0021-0022) On August 7, 2001 Forest and Edna Beebower filed a Chapter 7 Bankruptcy Petition, and on November 8, 2001 their debts were discharged[3]. On February 25, 2002, The Souzas paid Westlands $105,052.95 to remove the lien from their property. (RT pp. 303:8-304:14)

II. Procedural History

On October 5, 2001, the Petitioners filed a Notice of Claims Against Public Entity with Westlands. (CT Vol. 1 of 3, pp. 228-244) Petitioners stated eight claims: Breach of Written Agreement (Westlands' Water Agreement, of which the Petitioners claimed to be third-party beneficiaries); Breach of Oral Agreement; Breach of Fiduciary Duty; Negligent Misrepresentation; Negligence; Promissory Estoppel; To Remove Cloud on Title; and Indemnity. Petitioners did not assert a claim for violation of their Constitutional rights. On November 19, 2001, Westlands' Board of Directors considered and rejected Petitioners' claim. (CT Vol. 1 of 3, pp. 194-196, 224) Petitioners filed the instant action against Westlands on

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[3]Although these events were not formally in evidence, they are not in dispute and were presented to the court in opening statements. (RT p. 41:11-14)

March 4, 2002 in the Superior Court of Fresno County. (CT Vol. 1 of 2, pp. 0001-0024) On April 24, 2002, the Petitioners filed a Claim for Refund of Invalid Assessment with Westlands, incorporating by reference the facts, circumstances, allegations and claims set forth in their Notice of Claims Against Public Entity. (CT Vol. 1 of 3, pp. 216-220, 228-244) After their claim for refund was considered and denied by Westlands' Board of Directors on May 20, 2002 (CT Vol. 1 of 3, p. 215), Petitioners filed a First Amended Complaint on July 16, 2002. (CT Vol. 1 of 2, pp. 0034-0049)

Petitioners' initial complaint, and the first amended complaint, contained the identical eight causes of action against Westlands that were asserted in their Notice of Claims Against Public Entity. (CT Vol. 1 of 2, pp. 0001-0024, 0034-0049; CT Vol. 1 of 3, pp. 228-244) During trial, Petitioners requested leave to amend their complaint further to add a cause of action for refund of an erroneous or invalid assessment to conform to proof. The court granted the request over Westlands' objections. (RT pp. 840:17-841:9, 878:12-884-5; CT Vol. 1 of 3, pp. 245-260)

The matter was tried as a bifurcated trial, initially to the court alone on the issue of the governmental immunities pled as affirmative defenses. (RT pp. 3:1-4:24) Although the court found in favor of Westlands on various causes of action based on tort, the court found that the Petitioners' claim of express breach of contract based on alleged status as a third party beneficiary, the cause of action for indemnity, and refund of an erroneous or invalid assessment to be outside the scope of the immunities, and thus Petitioners proceeded to trial. (RT pp. 272:1-278-23)

Following the close of evidence and oral argument, the court invited each side to submit a Proposed Statement of Decision. (RT pp. 1016:25-1017:17). Although the court found in favor of Westlands on the indemnity claim, it ultimately found in favor of the Petitioners on the breach of contract and erroneous or invalid assessment theories. (CT Vol. 1 of 3, pp. 272-300) Westlands submitted written objections and the court scheduled oral argument. (CT Vol. 2 of 3, pp. 301-339; RT pp. 1018:1-1038:19) No alteration of the court's conclusions resulted. Judgment on the statement of decision was entered February 5, 2004. (CT Vol. 2 of 3, pp. 354-357) Notice of Appeal was filed by Westlands on April 19, 2004, and was timely under California Rules of Court, Rule 3. (CT Vol. 2 of 2, pp. 0327-0328)

The Court of Appeal of California, Fifth Appellate District, rendered its opinion on January 17, 2006[4]. The Court of Appeal found there was "no authority for the trial court's novel view that a landowner is entitled to avoid an otherwise valid assessment if a water district failed to follow an internal procedure." The Court of Appeal reversed the decision below in its entirety and held that Westlands' assessment was properly levied pursuant to the California Water Code and that the evidence failed as a matter of law to prove an invalid assessment. (Appendix, pp. A-10-16) The Court of Appeal also held on undisputed facts that, as a matter of law, the trial court erred in allowing Petitioners to recover for breach of contract on a third-party beneficiary theory, as Paragraph 21 of Westlands' Terms and Conditions was not designed to benefit Petitioners as individuals but, rather, to benefit the District as a whole. (Appendix, pp. A-16-26)

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[4]*Souza v. Westlands Water District et al.* (2006) 135 Cal.App.4th 879 is attached hereto as Appendix A.

As part of their cross-appeal, the Petitioners argued for the first time that the addition of the water charges to the assessment on their land violated their Constitutional right to equal protection. (Appendix, pp. A-26-30) The Court of Appeal held that the Petitioners were not entitled to raise new issues for the first time on appeal and declined to reach the equal protection issue. (Appendix, pp. A-29-30) The Petitioners argued to the Court of Appeal that their trial brief raised Constitutional issues, but as the Court noted, no argument or citation to authority of any kind accompanied Petitioners' parenthetical reference to "due process rights." (Appendix, p. A-29, Fn. 5) The Court of Appeal determined that the issue of equal protection was a new substantive theory of liability, concerning the unconstitutionality of the operative statue, that was not litigated at all in the trial court. (Appendix, p. A-29)

The Petitioners generally asserted in their Petition for Review to the California Supreme Court[5], for the first time and without citation to law, that principles of due process had been violated by Westlands' actions. (Petition for Review. pp. 3-4, 24-25) Petitioners' new argument in their Petition here is that the decision of the Court of Appeal allowed Westlands to violate Petitioners' Constitutional due process rights, and deprived Petitioners of a remedy. As in their brief to the Court of Appeal, Petitioners have now asserted another completely new substantive theory of liability that was not presented, litigated, nor ruled on at trial nor at the Court of Appeal and, therefore, this Court should deny the Petition.

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[5]Petitioners Petition for Review to the California Supreme Court was denied without comment on April 26, 2006.

SUMMARY OF REASONS TO DENY THE PETITION

The Souzas' (hereinafter "Petitioners") Petition should be denied because Petitioners have not complied with Supreme Court Rule 14.1 (g)(i). The Petition does not show that a claim under the federal Constitution was presented in the lower courts with sufficient definiteness for this Court to say that the lower courts' attention was challenged, or that the lower courts considered or necessarily passed upon any such question. Therefore, Petitioners cannot claim that a state court of last resort has decided an important federal question in a way that conflicts with a decision of another state court of last resort or of a United States court of appeal. Likewise, Petitioners cannot claim that the Court of Appeal of California, Fifth Appellate District, has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with the relevant decisions of this Court.

The Petitioners' Petition should be denied because Petitioners failed to explicitly and timely raise the Constitutional issue of denial of due process in their attack upon the Westlands Water District's (Hereinafter "Westlands") assessment in the state court. Because Petitioners did not present the issue of denial of due process to the state court, Petitioners failed to avail themselves of the opportunity to have the federal question decided in the state courts. Therefore, the decision of the Court of Appeal of California, Fifth Appellate District, necessarily determined only that the laws of the state of California were complied with. The Supreme Court of the United States lacks jurisdiction to review a determination of a California court wherein the laws of the state were complied with in levying an assessment, and where no federal question was invoked or implicated.

Furthermore, the Petition should be denied because Petitioners were, in fact, afforded due process and a fair opportunity to challenge the accuracy and validity of Westlands' assessment, including multiple opportunities to assert any claim for violation of Constitutional protections. Prior to filing suit in the superior court, Petitioners submitted two claims to Westlands' Board of Directors challenging the assessment pursuant to California Water Code section 36832 and Westlands' regulations. Following hearings and Westlands' subsequent rejection of their claims, Petitioners filed suit in superior court. While at trial on the matter, Petitioners amended their complaint for a second time to add an additional cause of action, "Refund of Erroneous Assessment." However, a violation of Petitioners' Constitutional right to due process was not pled in their complaints nor argued in the superior court, and was not pled nor argued in Petitioners' appeal. The federal issue was only raised by Petitioners, for the first time, in their Petition for Review to the California Supreme Court. The California Supreme Court denied the Petition without comment, and the issue was never decided in state court. Petitioners were provided independent and adequate procedural safeguards against unlawful deprivation, due process was satisfied, and the Court should therefore deny the Petitioners' Petition because the case does not qualify for or otherwise merit review in this Court.

REASONS FOR DENYING PETITION

I. A California State Court of Last Resort Has Not Decided An Important Federal Question In A Way That Conflicts With A Decision Of Another State Court of Last Resort Or Of A United States Court Of Appeal

The Petition should be denied on procedural grounds because Petitioners have not complied with Supreme Court Rule 14.1 (g)(i). *Live Oak Water Users' Asso. v. Railroad Com. of California*, 269 U.S. 354, 357 (1926). Petitioners have failed in their statement of the case to set forth, by specific quotation of pertinent portions of the record, when the federal questions sought to be reviewed were raised, the method or manner of raising them, and the way in which they were passed on by the state courts. The Petition does not reference the violation of equal protection argument that the Court of Appeal declined to decide, nor Petitioners' "hint of a constitutional issue" in a parenthetical reference to "due process rights" violation found in their trial brief. The Petition does not show that a claim under the federal Constitution was presented in the lower courts with sufficient definiteness for this Court to say that the lower courts' attention was challenged, or that the lower courts considered or necessarily passed upon any such question. *Live Oak Water Users' Asso.*, *supra*, 269 U.S. at 357.

It is well settled that if the decision of the state court rested on an independent ground, this Court has no jurisdiction to review the judgment of the state court. *Giles v. Teasley*, 193 U.S. 146, 160 (1904). Petitioners do not suggest that the decision of the Court of Appeal was improperly framed to evade consideration of the federal right now asserted. *Hartford Life Ins. Co. v. Johnson*, 249 U.S. 490, 493 (1919).

Furthermore, the general rule in California applicable in civil cases is that a constitutional question must be raised at the earliest opportunity or it will be considered waived. *Hershey v. Reclamation Dist. No. 108*, 200 Cal. 550, 564 (1927). The jurisdiction of this Court to review the proceedings of the state courts is limited to the specific instances of denials of federal rights, specially set up in the state court and denied by the rulings and judgment of that court. *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 97 (1909). This Court is not called upon to review the findings of facts made in the state court, but accepts the findings of the court of the State upon matters of fact as conclusive. *Id.*, citing *Quimby v. Boyd*, 128 U.S. 488; *Egan v. Hart*, 165 U.S. 188; *Dower v. Richards*, 151 U.S. 658; and *Thayer v. Spratt*, 189 U.S. 346. Where, as here, the federal question was never drawn into question or decided by a state court, it cannot be said that the decision of the state court conflicts with the Constitutional decisions of other state courts of last resort or of a United States Court of Appeal.

II. The Court Of Appeal Of California, Fifth Appellate District, Has Not Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court, Nor Has It Decided An Important Federal Question In A way That Conflicts With The Relevant Decisions of This Court

The conflict of a California law with the Constitution of the United States, and a decision by a California court in favor of its validity, does not appear on the face of the record. Before the decision of the Court of Appeal can be re-examined in this Court, it must appear in the pleadings of the suit, or from the evidence in the course of trial, in the instructions asked for, or from exceptions taken to the rulings of the court, that such a question was necessarily involved in the decision, and that the

California court would not have given a judgment without deciding it. *Lawler v. Walker*, 55 U.S. 149, 152 (1852).

In Petitioners' Notice of Claims Against Public Entity filed with Westlands on October 5, 2001, Petitioners stated eight separate claims, but did not assert a single claim for violation of their Constitutional rights. Likewise, the Petitioners' Claim for Refund of Invalid Assessment filed with Westlands on April 24, 2002, incorporated by reference the facts, circumstances, allegations and claims set forth in their Notice of Claims Against Public Entity, but did not add a claim for violation of Constitutional rights. Petitioners' complaint and first amended complaint contained the identical eight causes of action against Westlands, asserted in their Notice of Claims Against Public Entity but, again, there was no claim for violation of Constitutional rights. During trial, Petitioners requested and were granted leave to further amend their complaint to add a cause of action for refund of an erroneous or invalid assessment but, again, no claim for violation of Constitutional rights was alleged.

Petitioners first asserted, as part of their cross-appeal, that Westlands' additions of the water charges to the assessment on their land violated their Constitutional right to equal protection of the laws. The Court of Appeal declined to decide the issue when it held that the Petitioners were not entitled to raise new issues for the first time on appeal. In reaching this decision, the Court of Appeal correctly stated that the decision to consider this new issue for the first time on appeal was within the court's discretion and noted the court's obligation to avoid deciding Constitutional issues unless absolutely necessary to do so. *City of Huntington Park v. Superior Court*, 34 Cal. App. 4th 1293, 1299 (1995), citing *Rosenberg v. Fleuti*, 374 U.S. 449, 451 (1963). Because the Court of Appeal did not

decide an important question of federal law, this Court lacks jurisdiction to review the Court of Appeal decision.

III. Denial Of The Petition Is Proper Where The State Court Based Its Decision On A Local And State Question, The California Supreme Court Denied The Petition For Review Without Comment, A Federal Question Was Not Presented And Decided, And It's Decision Was Not Necessary To The Cause

The case presented in the superior court and ultimately decided in the Court of Appeal of California, Fifth Appellate District, was based upon general principles of contract and tort law and, specifically, on the California Water Code. Nowhere in the record does it appear that the protections of the United States Constitution, laws, treaties, or executive proclamations were presented to the lower courts and necessarily involved in the decisions. This Court's jurisdiction over the decisions of the state is not derived from the citizenship of the parties, but from the questions involved and decided. *New York Life Ins. Co. v. Hendren*, 92 U.S. 286, 287 (1876).

Even assuming this Court sustained Petitioners' argument that a federal question was argued or presented to the lower California courts for decision, it does not appear from the record that the decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. *Brown v. Atwell*, 92 U.S. 327, 329 (1876). Where, as here, it does not appear that the Court of Appeal previously dealt with the Constitutional issue on the ground that the federal question was not before the trial court, this Court cannot say that the Court of Appeal erred. *Cox v. Texas*, 202 U.S. 446, 452 (U.S. 1906). Without more, the Petition should be denied.

IV. Petitioners Were Afforded Due Process And Multiple Opportunities To Challenge The Accuracy And Validity Of Westlands' Assessment, Including Opportunities To Assert Any Claim For Violation Of Constitutional Protections

A. Petitioners Fail To Acknowledge That They Have Been Afforded Due Process And Misstate The Law.

In their Petition, Petitioners do not mention that prior to filing their civil action they were afforded two administrative hearings before Westlands' Board of Directors to present their claims in accordance with California Government Code sections 900, et seq., California's Tort Claims Act. Petitioners were provided an opportunity to be heard and Westlands' Board of Directors investigated and considered their claims before the claims were rejected. Petitioners were also provided notice of their right to file a court action in the notice of claim rejection and, thereafter, filed the suit giving rise to this Petition.

Apparently, Petitioners contend the trial court was correct in its "novel view that a landowner is entitled to avoid an otherwise valid assessment if a water district fails to follow an internal procedure" because now, Petitioners claim that Westlands' failure to comply with Paragraph 21 of its Terms and Conditions resulted in an illegal sale of water to Petitioners' tenant and invalidated Westlands' assessment power under the Water Code. Petitioners state at page 19 of their Petition, that due process requires an agency to follow its own regulations and "where internal regulations afford procedural protections rather than facilitate agency housekeeping, the Court has insisted on compliance" with regulations designed to safeguard individual interests. For authority, Petitioners cite *American*

Farm Lines v. Black Ball Freight Services, 397 U.S. 532, 538 (1970).

The Petitioners neglect to mention that this Court, in *American Farm Lines*, found that the agency rules at issue in that case were not intended primarily to confer important procedural benefits on individuals and held in favor of the agency's actions. *American Farm Lines*, *supra*, 397 U.S. at 538-539. Petitioners also fail to inform this Court in their Petition that the Court of Appeal held that Paragraph 21 of Westlands' Terms and Conditions was not designed to benefit Petitioners as individuals but, rather, to benefit the District as a whole. In *American Farm Lines*, this Court also held that there was no reason to exempt the case from the general principle that "it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business when in a given case the ends of justice require it." *Id.* at 539, emphasis added, citing *NLRB v. Monsanto Chemical Co.*, 205 F.2d 763, 764 (8th Cir. 1953).

Petitioners contend at page 20 of the Petition that the "due process clause is invoked where, as here, 'an individual has reasonably relied on agency regulations promulgated for his guidance or benefit and has suffered substantially because of their violation by the agency'," citing *Tolchin v. Supreme Court*, 111 F.3d 1099, [1155] sic (3rd Cir. 1997). Not only do Petitioners provide the incorrect page number of the quoted portion of the case, but Petitioners take the quotation out of context resulting in a misstatement of the law. This Court in *Tolchin* provided that, "[A]n agency's failure to follow its rules and regulations, however, is not a per se violation of due process." *Tolchin*, *supra*, 111 F.3d at 1155, citing *United States v. Caceres*, 440 U.S. 741 (1979). The court in *Tolchin* went on

to state that "only when an agency violates regulations mandated by the Constitution or by law; or when 'an individual has reasonably relied on agency regulations promulgated for his guidance or benefit and has suffered substantially because of their violation by the agency'," is the Due Process Clause implicated. *Id* at 1155. Petitioners did not present, and the Court of Appeal did not decide, the case below on the issue of Westlands' violation of Constitutional rights.

In addition, Petitioners fail to acknowledge that the Court of Appeal did not find that Westlands promulgated its rules for the guidance and benefit of the individual Petitioners but, rather, for the District as a whole. Recently, the Ninth Circuit held that Westlands' landowners and water users who "benefit from a government contract are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary." *Orff v. United States*, 358 F.3d 1137, 1145 (9th Cir. 2004). This Court, in ultimately deciding the issues, did not disturb the Ninth Circuit's relevant analysis and determination that Westlands' landowners and water users were not intended third-party beneficiaries of a contract between Westlands and the Bureau of Reclamation. *Orff v. United States*, 125 S. Ct. 2606 (2005).

B. Petitioners Cannot Claim They Were Denied Due Process Of Law In Levying The Assessment, Where They Failed To Avail Themselves Of Their Opportunity To Be Heard On The Constitutional Issue, And Misstate The Law In That Regard.

Petitioners claim in their Petition at page 28 that "[D]ue process requires a fair opportunity to challenge the accuracy and legal validity of a tax and a 'clear and certain remedy' if an

unlawful tax is paid to ensure that the opportunity to contest the tax is a meaningful one," and cite *McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco,* 496 U.S. 18, 39 (1990). Petitioners fail to acknowledge that *McKesson* also provides that a state-court judgment is unreviewable where, as here, it rests on an independent and adequate state-law ground. *McKesson, supra,* 496 U.S. at 31. Because Petitioners did not specifically raise the Constitutional issue in the California state courts and the issue was not decided, the judgment of the Court of Appeal necessarily determines that the state laws were complied with and unless a federal right is involved, the state court's application of local laws should not be reviewed here. *Campbell v. Olney,* 262 U.S. 352, 354 (1923).

Petitioners claim at page 28 of the Petition that they were denied due process when the Court of Appeal failed "to recognize, let alone craft, a meaningful post-deprivation remedy." Petitioners' reliance on *McKesson* is misplaced where this Court recognized that "States have a legitimate interest in sound fiscal planning and that this interest is sufficiently weighty to allow States to withhold pre-deprivation relief for allegedly unlawful tax assessments, providing post-deprivation relief only." *McKesson, supra,* 496 U.S. at 50.

This Court, and the Court of Appeal, recognized the importance of insuring a government's financial security and the real threat of allowing taxpayers to litigate their tax liabilities prior to payment. *Id.* at 37. In light of encouraging government financial security, this Court has long held that a State may employ distress sales and other remedies in order to encourage taxpayers to make timely payments "prior to resolution of any dispute over the validity of the tax assessment." *McKesson, supra,* 496 U.S. at 37. The availability of the pre-deprivation hearing provided by Westlands to Petitioners constituted a

procedural safeguard against unlawful deprivations sufficient, by itself, to satisfy the Due Process Clause. *Id.* at 50. The Petitioners cannot complain if they failed to raise the Constitutional issues when they did avail themselves of the pre-deprivation administrative procedure on two occasions and post-deprivation judicial review in state court on three more occasions.

Even assuming that Petitioners had raised Constitutional issues below, under the holding of *Anniston Mfg. Co.* the Petition should be denied. In *Anniston Mfg. Co. v. Davis*, 301 U.S. 337 (1937), Petitioner filed suit seeking to recover amounts paid as cotton "processing" taxes and as cotton "floor stock" taxes. Unlike the Petitioners here, the Petitioner in *Anniston* challenged the constitutionality of a statute, sections 901-917 of the Revenue Act of 1936. The Revenue Act of 1936 established a special and exclusive administrative procedure before a Board of Review in the Treasury Department, and provided for a judicial review of the Board's decisions with respect to the refunding of cotton processing taxes collected under the Agricultural Adjustment Act of 1933.

In *Anniston Mfg. Co.* this Court concluded that:

> "[T]he authorized procedure provides for a full and fair hearing and determination of all matters of fact and that, through judicial review, it provides for the protection of all the legal rights of the petitioner including any constitutional right which it may be entitled to invoke with respect to the refund which it seeks. The petitioner may thus obtain through this proceeding whatever judgment its case warrants, a judgment which the Government, by virtue of

the requirement that the Commissioner shall make refund accordingly, binds itself to pay."

Anniston Mfg. Co., supra, 301 U.S. at 357.

CONCLUSION

Petitioners' complaint that they were deprived of due process and a post-deprivation remedy is without merit. The record clearly shows that Petitioners were provided due process, and the Constitutional issues were never specifically raised or decided below. The Petitioners seek review in this Court not because they were deprived of due process, but rather, because the Court of Appeal properly deprived Petitioners of an unjust result granted by the trial court. The Writ of Certiorari should be denied.

Respectfully submitted,

Dated: 8/30/2006 By;_____

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TILVA L. SOUZA, Individually and as Trustee, etc., et al., Plaintiffs and Appellants, v. WESTLANDS WATER DISTRICT et al., Defendants and Appellants.

TILVA L. SOUZA, Individually and as Trustee, etc., et al., Plaintiffs and Respondents, v. WESTLANDS WATER DISTRICT et al., Defendants and Appellants.

F045293, F046478

COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

135 Cal. App. 4th 879; 38 Cal. Rptr. 3d 78; 2006 Cal. App. LEXIS 41; 2006 Cal. Daily Op. Service 488; 2006 Daily Journal DAR 695

Filed January 17, 2006.
Review Denied April 26, 2006.

PRIOR HISTORY:

Appeal from a Judgment of the Superior Court of Fresno County, No. 02 CE CG 00718, Mark Wood Snauffer, Judge.

DISPOSITION:

The judgments in favor of the Souzas' against the district and ACCO and the award of attorneys' fees are reversed. The court dismissed the Souzas' cross-appeal as moot.

COUNSEL:

Felger & Associates, Warren P. Felger and Jennifer D. Reisz for Plaintiffs and Appellants and for Plaintiffs and Respondents.

Borton, Petrini & Conron, Thomas C. Matychowiak and Lawrence E. DeWitt for Defendant and Appellant Westlands Water District.

McKinley & Capeloto, McKinley & Associates and Robert D. McKinley for Defendant and Appellant ACCO Finance Co.

OPINION:

WISEMAN, J.

By statute, a California water district may add unpaid water charges to its regular assessment against land served by the district. The assessment automatically constitutes a lien on the land, and this is true whether the water was used by the owner or a tenant. This case presents an issue of first impression: Where the water is used by a tenant, does a district forfeit its right to add the charges to the assessment and encumber the land because, had the district followed its own regulations, the tenant would have been required to post adequate security for all the charges in advance or the water would have been turned off? Specifically, does the district lose the statutory rights just described if, pursuant to its regulations, it demands a guaranty before continuing to supply water to a tenant with a history of delinquencies, but then, contrary to its regulations, supplies more water than the guaranty can cover and the tenant again defaults? The trial court's judgment against

Westlands Water District answered this question in the affirmative, effectively converting the district's regulations on delinquent customers from a shield for the district to a sword for delinquent customers' landlords. It ruled that the assessment against the land was invalid because the district violated its regulations when it supplied water without obtaining an adequate guaranty from the tenants. This was error. Assuming the district violated its regulation, no authority supports the notion that the violation gave the owner the right to escape an assessment otherwise valid and authorized by statute.

The trial court was also incorrect in its alternative ruling that the landowners were entitled to enforce the regulations as intended third party beneficiaries of the water agreement between the tenants and the district. The agreement referred to and incorporated the district's regulations. For multiple reasons, however, the owners could not have been third party beneficiaries as a matter of law.

We decline to address the landowners' argument that the assessment violated their right to equal protection of the laws, which they have raised for the first time on appeal. We reverse the judgment against the district and the award of attorneys' fees the owners obtained as prevailing parties.

Finally, we also reverse the judgment in favor of the owners against the guarantor. The court erred in ruling that the owners could recover as third party beneficiaries of the guaranty provided by the tenants to the district.

FACTUAL AND PROCEDURAL HISTORIES

The essential facts are undisputed. We draw them primarily from the trial court's statement of decision.

The plaintiffs are members of the Souza family (the Souzas), who own farmland in the area served by defendant Westlands Water District (the district). They leased the land to Forrest and Edna Mae Beebower (the Beebowers) for the period from March 1, 1999, to October 31, 2001. Among other things, the lease required the Beebowers to pay the water bill.

The Beebowers entered into a contract with the district for irrigation water by executing an agricultural water allocation application and purchase agreement (the water agreement) and submitting it to the district. In the water agreement, the Beebowers promised "[t]o comply with the Terms and Conditions for Agricultural Water Service and the Regulations for the Allocation of Agricultural Water ... both of which are incorporated herein as though set forth at length." Paragraph 18 of the terms and conditions provided that "[a]gricultural water service shall not be provided to any water user with delinquent charges ... ." Paragraph 21 of the terms and conditions (paragraph 21) stated:

> "If a water user's delinquent charges are delinquent for 60 days or more ... the General Manager shall require, as a condition of resumption of water service, that advance payment of all water charges be made for the 12-month period immediately following resumption of service, according to a schedule to be determined by the General Manager. A written guaranty in a form satisfactory to the

General Manager from a recognized financial lending institution may be submitted in lieu of advance payment."

During the first year of the lease, at the end of 1999, the Beebowers fell behind in their water payments and had delinquent charges for more than 60 days. The district instructed them by letter to comply with paragraph 21. The letter stated that if the Beebowers used the guaranty option, the guaranty must be sufficient to cover all water used through January 31, 2001.

On February 29, 2000, the Beebowers paid all their outstanding charges and had a zero balance on their account on March 1, the first day of the water year. The Beebowers also obtained a guaranty from defendant ACCO Finance Company (ACCO) for future water payments. The district accepted it on April 4, 2000. It guaranteed payments for water purchased after April 3, 2000, up to $ 98,306, and had an expiration date of October 30, 2000.

At the time the Beebowers were behind in their water payments at the end of 1999 and early 2000, they also fell behind in their rent payments. After they missed the rent payment of $ 175,000 for the second year of the lease, due on November 1, 1999, the Souzas obtained a judgment against them and a writ of possession. The Beebowers subsequently paid the rent, however, and were not evicted.

The Beebowers experienced financial difficulties again in the second year of the lease. They defaulted on their July 2000 water bill for $ 52,586.02. The district submitted that invoice to ACCO, which paid it. The district subsequently obtained payment of $ 14,355.80 from ACCO for additional

delinquent charges. ACCO refused to pay more, claiming that the balance of the $ 98,306 guaranty (i.e., $ 31,364.18) had been consumed by water payments it made on the Beebowers' behalf before they defaulted.

During this period, the Souzas were aware of the Beebowers' financial problems and through their lawyer sent a letter to the district requesting that it provide them with duplicates of the monthly invoices sent to the Beebowers. The district wrote back explaining that copies of each invoice were already being sent to the Souzas and that if they wished additional control over the account, they could substitute themselves as the water users for their parcels. This was never done.

The district continued supplying water to the Beebowers while they were in default and after the ACCO guaranty was exhausted. The Beebowers were never able to pay. On May 15, 2001, the district added the Beebowers' delinquent water charges to the regular assessment on the land. With penalties and interest, the additional assessment was $ 108,308.95.

The Souzas filed a notice of claims against public entity with the district on October 5, 2001, seeking to discharge the assessment. The district denied the Souzas' claims. Next, on December 10, 2001, the Souzas requested that the district waive paragraph 18 of the terms and conditions, barring water service to land on which delinquent charges have been incurred, so that farming operations could continue on the land while they sought judicial relief. The district denied this request also, observing that the Souzas had the ability to pay first and pursue relief afterward. To ensure that water would be supplied to the land the next year, the Souzas paid the additional assessment.

The Souzas then filed this litigation against the district and ACCO. Against the district, the complaint alleged eight causes of action: breach of the written water agreement (of which the Souzas claimed to be third party beneficiaries); breach of an oral promise not to place a lien on the property; breach of fiduciary duty; negligent misrepresentation; negligence; promissory estoppel; removal of cloud on title; and indemnity. Against ACCO, the complaint alleged breach of the guaranty agreement, also under a third party beneficiary theory.

The case was tried to the court sitting without a jury. The trial was bifurcated, with the district presenting its governmental immunity defenses in the first phase. The court ruled that the district had immunity from the Souzas' claims of negligent misrepresentation and negligence. During the second phase, after the plaintiffs rested, the court granted judgment for the district on the Souzas' claims of breach of an oral contract (for lack of evidence), promissory estoppel (by plaintiff's stipulation), and breach of fiduciary duty (no such duty between landowner and water district). After the plaintiffs' closing argument, the plaintiffs stipulated to judgment for the district on the claim for removal of a cloud on title.

During trial, the Souzas requested leave to amend their complaint to conform to proof. They sought leave to add a cause of action for a refund of an invalid assessment. The court granted the request over the district's objection. The amended complaint alleged that the assessment was invalid because it resulted from the district's failure to obtain advance payment from the Beebowers or a guaranty covering all charges. The amended complaint also added ACCO as a defendant on the indemnity claim.

The claims remaining after trial were breach of the water agreement, invalid assessment, indemnity, and breach of the guaranty agreement. The court issued a statement of decision resolving these, relying primarily on the invalid-assessment theory to find for the Souzas. The court reasoned that paragraph 21 had the force of law because it was a quasi-legislative rule promulgated pursuant to authority delegated by the Legislature. The district violated paragraph 21, the court found, because it did not obtain payment from the Beebowers in advance after their delinquency, and did not obtain a guaranty sufficient to cover 12 months of charges. The district should have taken, but did not take, reasonable steps to ensure that the $ 98,306 guaranty was enough, according to the court: Several reasonable methods of projecting the Beebowers' water costs for the year were available to the district, yielding estimates between $ 170,691 to $ 294,000, showing that the guaranty's limit was far too low. Asserting that "Westlands must follow its own rules before levying assessments on plaintiffs' Farmland," the court concluded that the Souzas were entitled to a refund.

The court also found that the district breached the water agreement and that the Souzas could recover for the breach as third party beneficiaries. The district breached the agreement, the court ruled, by violating paragraph 21 of the terms and conditions. Emphasizing the benefit that would have inured to the Souzas if the district had not violated paragraph 21, the court found that the Souzas must have been intended, not incidental, beneficiaries.

The statement of decision further stated that ACCO breached its guaranty agreement when it refused to pay $ 31,364.18 of the face amount after the Beebowers' default

because it had already paid that portion before the default. The court concluded that, because that payment was made before default, it was not a payment under the guaranty, so ACCO was liable to pay it again after the default. The court found that the Souzas were intended third party beneficiaries of the guaranty for the same reasons they were intended third party beneficiaries of the water agreement. It ruled that the district was entitled to a credit for any amount the Souzas should collect from ACCO.

Finally, the court ruled against the Souzas on their indemnity theory against the district. It found there was no oral or written promise by the district to indemnify the Souzas against losses caused by the Beebowers' default and therefore no liability under the doctrine of express contractual indemnity. After mentioning the doctrines of implied contractual indemnity and equitable indemnity, the court made no ruling on them, apparently assuming the Souzas were not relying on those doctrines. The statement of decision does not address the Souzas' indemnity claim against ACCO, presumably because of the ruling on the breach of contract claim against ACCO.

After judgment was entered for the Souzas, they filed a motion for $ 179,449 in attorneys' fees and $ 16,336 in costs. The court granted the motion, awarding the full amount of fees and $ 7,091.99 in costs. The court's order cited Revenue and Taxation Code section 5152 (attorneys' fees for recovery of a void assessment) and Code of Civil Procedure section 1021.5 (attorneys' fees for enforcement of an important right affecting the public interest) as authority for the award.

The district and ACCO appealed from the judgments against them. The Souzas cross-appealed, arguing that the district should not get a credit for amounts the Souzas might

collect from ACCO. In a separate appeal, the district seeks reversal of the attorneys' fees award. [1]

DISCUSSION

I. Validity of the assessment

The district argues that even if it violated paragraph 21, the violation did not justify the trial court's invalidation of a statutorily authorized assessment. The question is one of law, so our review is de novo. (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1687 [40 Cal. Rptr. 2d 125]; *Dawson v. East Side Union High School Dist.* (1994) 28 Cal.App.4th 998, 1041 [34 Cal. Rptr. 2d 108].)

We agree with the district. The assessment was properly levied pursuant to the Water Code, and there is no authority for the trial court's novel view that a landowner is entitled to avoid

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[1]On February 1, 2005, the Souzas filed a request that we take judicial notice of the agenda for the district's January 18, 2005, board meeting and of a district notice to landowners dated January 27, 2005. The documents pertain to changes in the district's regulations postdating the events at issue in this case. On July 22, 2005, the district filed a request that we take judicial notice of *Orff v. U. S.* (9th Cir. 1999) 358 F.3d 1137 and *Orff v. U. S.* (2005) __ U. S. __ [162 L. Ed. 2d 544, 125 S. Ct. 2606]. The Souzas filed an opposition to this request.

The material submitted by the Souzas may be judicially noticed pursuant to Evidence Code section 452, subdivisions (b) and (h). The cases submitted by the district must be judicially noticed pursuant to Evidence Code section 451, subdivision (a). Both requests are granted.

an otherwise valid assessment if a water district fails to follow an internal procedure.[2]

The power of a water district's board of directors to impose an assessment for unpaid water charges on the land where the water was used is established by the Water Code:

> "If authorized by the board of directors by resolution, [the assessor shall] add to the assessment of each parcel of land any charges for water and other services, or either, which are unpaid. The amount so added shall be collected and shall constitute a lien as a part of the assessment levied on the parcel upon which the water for which the charges are unpaid was used and upon the lands subject to the unpaid charges for any other services." (Wat. Code, § 36726, subd. (c).)

Water Code section 36825 reiterates that "any unpaid charges for water and other services added to the assessment under the provisions of Section 36726 are a lien on the land and impart notice of the lien to all parties."

Apart from the effect of paragraph 21, it is undisputed that the unpaid water charges were validly added to the assessment against the Souzas' land and became a lien against the land pursuant to statute. The trial court's view was that the

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[2]The district also argues that, notwithstanding the mandatory language of paragraph 21 ("the General Manager shall require ..."), it had discretion to accept a guaranty that did not cover 12 months of service, and therefore it did not violate paragraph 21. Because of our decision, we need not consider whether this is correct.

violation it found of paragraph 21 vitiated the addition of the charges to the assessment and vitiated the lien. Citing *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10 [78 Cal. Rptr. 2d 1, 960 P.2d 1031], it stated that the district's regulations were quasi-legislative rules and had "the dignity of statutes." Therefore, the court ruled, the district "must adhere" to its regulations and "the failure to follow these rules is a violation of the law." Most important, the court ruled that the district "must follow its own rules *before levying assessments on plaintiffs' Farmland*." (Italics added.) Because it did not, the assessment was invalid.

Omitted from this rationale is an explanation why invalidating the assessment and ordering a refund is a proper remedy for the district's violation. The Water Code sections cited above provide simply that, if authorized by the district's board, unpaid water charges shall be added to the assessment on the land on which the water was used, shall be collected, and shall be a lien on the land. They do not provide that the validity of the assessment depends on whether the charges were incurred by an owner or a tenant or whether the district followed its procedures in attempting to obtain payment from a tenant before adding the charges to the assessment. The regulations also do not state or imply that following them is a precondition of the enforceability of the district's statutory rights against landowners.

Even if the district's regulations did purport to disable the district's statutory assessment powers in cases where the regulations were not followed, there is no authority for the view that any such self-imposed disability would be legally effective. Assuming the trial court was correct in characterizing the regulations as quasi-legislative rules entitled to judicial deference and having the status of substantive law under

Yamaha Corp. of America v. State Bd. of Equalization, supra, 19 Cal.4th 1, there is still no warrant for the view that the district can establish exceptions to its own statutory authority by making regulations and not following them.

The only authorities cited by the trial court in support of its view that the district's violation of paragraph 21 deprived it of its statutory power to assess the unpaid charges against the land are Government Code section 15606 and *Main & Von Karman Associates v. County of Orange* (1994) 23 Cal.App.4th 337, 342 [28 Cal. Rptr. 2d 432]. The Souzas' brief cites no authority at all for the view that the district's violation of paragraph 21 forfeited its right to add the unpaid water charges to the assessment on the land.

In any event, neither authority is much help to the Souzas' case. The parts of Government Code section 15606 cited by the court provide that the State Board of Equalization shall "[p]rescribe rules and regulations to govern local boards of equalization when equalizing, and assessors when assessing" and that "[t]his section is mandatory." As no rules promulgated by the State Board of Equalization are at issue in this case, we see no relevance to these provisions. Even assuming, as the court asserted, that paragraph 21 is "analogous" to rules promulgated by the State Board of Equalization in that it is binding on the district, the fact that a rule is binding on a government entity does not, by itself, mean that a citizen, taxpayer, or property owner has a right to any particular remedy if the rule is violated.

Main & Von Karman Associates v. County of Orange, supra, 23 Cal.App.4th 337 involved a county assessor's use of an incorrect valuation method when assessing property taxes. The assessor used a valuation method known as the comparable

sales method to determine the value of a commercial property. Rule 4 of the State Board of Equalization required assessors to make certain adjustments to valuations computed by that method. The adjustments were not made. (*Id.* at pp. 340-341.) The owner appealed the assessment to Assessment Appeals Board No. 1 for Orange County, which affirmed the assessor on the issue of methodology. (*Id.* at pp. 340, 341-342.) The superior court denied the owner's petition for a writ of mandate. (*Id.* at p. 342.) Reversing, the Court of Appeal held that rule 4 was mandatory. (*Id.* at. pp. 342-343.) It directed that the case be remanded to the assessment appeals board for further hearings consistent with the rule. (*Id.* at p. 344.) The case stands only for the well-settled proposition that if an assessor calculates property taxes using the wrong method, the taxpayer is entitled to an order directing that the taxes be recalculated using the right method. It does not support the notion that an assessment against land for unpaid water charges is invalid because the water district broke a rule requiring it to take certain steps to secure payment from a tenant of the land's owner.

In sum, the trial court relied on a non-sequitur. The charges may have gone unpaid by the tenants partly because the district failed to follow mandatory internal procedures, but that does not suspend the district's statutory authority to levy an assessment for unpaid charges on the land where the water was used.

We recognize the public policy considerations implicated by the trial court's decision in this case. We may take judicial notice of the fact that, without irrigation, Westlands Water District would be a dry place:

> "The Westlands area receives only about seven inches of rainfall per year, primarily during the

> winter months. No dependable source of surface water is found nearby, and the groundwater supply is insufficient and of poor quality. As a result, the District must rely on irrigation with imported water to make the lands agriculturally productive." (Wilson, *Westlands Water District and Its Federal Water: A Case Study of Water District Politics* (1988) 7 Stan. Envtl. L.J. 187, 189, fn. omitted.)

Whether they farm their land or lease it, landowners depend on the functioning of the district to confer economic value on their holdings. In an early case upholding a new irrigation district law and its assessment provisions, the California Supreme Court recognized that the law promoted the common good:

> "[The law] has for its main object the utilizing and improvement of vast tracts of arid and unfruitful soil, desert-like in character, much of it, which, if water in sufficient quantity can be conducted upon and applied to it, may be [placed under cultivation]. Such a general scheme, by which immigration may be stimulated, the taxable property of the state increased, the relative burdens of taxation upon the whole people decreased, and the comfort and advantage of many thriving communities subserved, would seem to redound to the common advantage of all the people of the state, to a greater or less extent." *(Turlock Irrigation Dist. v. Williams* (1888) 76 Cal. 360, 368-369 [18 P. 379].)

Like any other entity, the district must be financially viable in order to function, and its ability to collect water charges is obviously crucial to its financial viability. Paragraph 21 allows the district to take steps to ensure payment by delinquent water users while minimizing the need to resort to assessments. The trial court converted the district's failure to fully implement this benign measure in this case into the basis for a new inroad, unsupported by any authority, on water districts' assessment powers. The right to levy assessments is at the foundation of a water district's statutory authority as a governmental entity and of its ability to obtain payment for its services. These observations are not necessary to augment the reasons for reversal set forth above. They do, however, illustrate the negative consequences that could flow from allowing the trial court's decision to stand.

We hold that the evidence failed as a matter of law to prove an invalid assessment. Because of this conclusion, we need not address the district's contention that the court erred in allowing the Souzas to amend their complaint to add that claim.

II. Breach of contract

The district challenges the trial court's ruling that the district breached the water agreement between it and the Beebowers by violating paragraph 21, and that the Souzas were entitled to recover for that breach as third party beneficiaries. We agree with the district.

"Generally, it is a question of fact whether a particular third person is an intended beneficiary of a contract," which we review under the substantial evidence standard. (*Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1233 [18 Cal. Rptr. 3d 178].) If, however, as here, the issue is

presented to the court on the basis of undisputed facts and uncontroverted evidence and only a question of the application of the law to those facts need be answered, our review is de novo: "[W]here ... the issue [of whether a third party is an intended beneficiary] can be answered by interpreting the contract as a whole and doing so in light of the uncontradicted evidence of the circumstances and negotiations of the parties in making the contract, the issue becomes one of law that we resolve independently." (*Ibid.*)

" 'The test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract. [Citation.] If the terms of the contract necessarily require the promisor to confer a benefit on a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person. The parties are presumed to intend the consequences of a performance of the contract.' [Citation.]" (*Prouty v. Gores Technology Group, supra*, 121 Cal.App.4th at p. 1232.) A party need not show that it was intended to benefit as an individual and may prevail by showing that it is a member of a class the parties intended to benefit. (*Ibid.*) At the same time, it is not enough that the third party would incidentally have benefited from performance. (*Martinez v. Socoma Companies, Inc.* (1974) 11 Cal.3d 394, 406 [113 Cal. Rptr. 585, 521 P.2d 841]; *Bancomer, S. A. v. Superior Court* (1996) 44 Cal.App.4th 1450, 1459 [52 Cal. Rptr. 2d 435].) "The circumstance that a literal contract interpretation would result in a benefit to the third party is not enough to entitle that party to demand enforcement. The contracting parties must have intended to confer a benefit on the third party." (*Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 348 [87 Cal. Rptr. 2d 856].) In determining whether the contract contemplates a benefit to the third party, the court must read the contract in light of the circumstances in

which the parties entered into it. (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 437 [204 Cal. Rptr. 435, 682 P.2d 1100].)

The trial court's ruling misapplied the third party beneficiary doctrine. First, the doctrine presupposes that the defendant made a promise which, if performed, would have benefited the third party. " 'Where one person for a valuable consideration engages with another to do some act for the benefit of a third person ... the party for whose benefit the contract or promise was made, or who would enjoy the benefit of the act, may maintain an action against the promisor for breach of his engagement.' " (*Prouty v. Gores Technology Group*, *supra*, 121 Cal.App.4th at p. 1232.) But the water agreement contains no promise or engagement by the water district to follow paragraph 21 or any other regulation. It is true, as the statement of decision notes, that the water agreement incorporates "as though set forth at length" the terms and conditions for agricultural water service and the regulations for the allocation of agricultural water, which include paragraph 21. A fuller quotation of the same passage, however, shows that the agreement provides as follows:

> "Beebower Farms, herein referred to as 'Water User,' hereby applies for agricultural water for the March 2000-February 2001 Water Year and agrees, as a condition of the allocation and furnishing of any agricultural water during that water year and in accordance with the District's Regulations, as follows: [¶] ... [¶] To comply with the Terms and Conditions for Agricultural Water Service and the Regulations for the Allocation of Agricultural Water, copies of which will be furnished upon request, both of

which are incorporated herein as though set forth at length."

This provision commits *only the water user* to comply with the district's regulations. The district does *not* promise the water user that it will follow its internal procedures in this or any other provision of the agreement. Further, with respect to paragraph 21, there are no grounds for *inferring* a mutual promise, because paragraph 21 only imposes a burden on the water user (advance payment or a guaranty of payment). The water user has no interest in obtaining the water district's promise that it will impose that burden. The district, likewise, had no need to include in the agreement its own promise to do what is in its own interest--no reason, in other words, to make the promise to itself.

If a contract is to be a basis of liability for the district's violation of paragraph 21--a basis independent of the theory that the district cannot levy an assessment unless it follows its own rules--it must be a contract in which the district promises to abide by paragraph 21. The water agreement does not contain that promise.

Second, even if the district had promised the Beebowers that it would follow paragraph 21, there is no evidence in the record that the Beebowers had any intent that the promise would benefit the Souzas. The trial court relied on evidence that

the district intended landowners to benefit from paragraph 21,[3] but that was not the correct inquiry. The point of the third party beneficiary doctrine is to allow a third party to enforce, against a promisor, rights running to the third party for which the *promisee* bargained. The promisor's intent is not at issue (although its knowledge of the promisee's intent may be [see *Martinez v. Socoma Companies, Inc.*, *supra*, 11 Cal.3d at p. 401]). Corbin states: "In third party cases, the right of such party does not depend upon the purpose, motive, or intent of the promisor." (9 Corbin on Contracts (2002) § 776, p. 14.)

Third, the Souzas were neither donee beneficiaries nor creditor beneficiaries and therefore cannot recover as third party beneficiaries at all. The law's focus on the intent of the promisee to secure a benefit for the third party is reflected in the traditional division of third party beneficiaries between donee beneficiaries and creditor beneficiaries. This division appears in section 133 of the Restatement First of Contracts and has been embraced by California courts. (See, e.g., *Martinez v. Socoma Companies, Inc.*, *supra*, 11 Cal.3d at p. 400; *Outdoor*

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[3]The court mentioned two purported pieces of evidence of the district's intent to benefit landowners: First, paragraph 22 of the terms and conditions for agricultural water service augments paragraph 21 by permitting the district to impose advance payment or other conditions on a water user if it determines that the user's actions "create a financial risk or hardship for the District or its landowners." Second, a letter from the district to the Beebowers dated January 7, 2000, stated that the requirement of advance payment or a guaranty was being imposed pursuant to rules established "in order to protect the District, its water users, and landowners." The Souzas' brief mentions a third purported piece of evidence on this issue: testimony by William Johnston, an engineering consultant for the district. Johnston testified that at one time, the district used "landowner cards" to obtain owners' acknowledgements that they were statutorily required to pay for water if their tenants defaulted. At "[a]bout the same time" that the district adopted the paragraph 21 procedure, it stopped using the cards.

Services, Inc. v. Pabagold, Inc. (1986) 185 Cal.App.3d 676, 681 [230 Cal. Rptr. 73].) Section 302 of the Restatement Second of Contracts eliminated the terms "donee" and "creditor" but retained the same concepts under new descriptions. (See 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 687, pp. 773-774.) As will be seen in the following discussion, both types of beneficiaries derive their status from an intent or obligation of a promisee to benefit them. The lack of such an intent or obligation on the part of the promisee defeats the third party's claim.

A donee beneficiary is a party to whom a promisee intends to make a gift (i.e., a benefit the promisee had no duty to confer) of a promisor's performance. An example is the plaintiff in *Gourmet Lane, Inc. v. Keller* (1963) 222 Cal.App.2d 701 [35 Cal. Rptr. 398]. There, the plaintiff, an incorporated association, sued one of its members for failing to bear a share of certain costs, as the member had agreed to do in an agreement among all the members pursuant to which the association was incorporated. (*Id.* at pp. 702-704.) The Court of Appeal affirmed a ruling that the corporation could recover as a third party beneficiary: It was a donee whom the other members intended to benefit by obtaining the promise of payment from the defendant member. (*Id.* at pp. 704-706.) The Souzas were not donee beneficiaries: There is no evidence of any intent on the Beebowers' part to give them anything as a gift.

A creditor beneficiary is a party to whom a promisee owes a preexisting duty which the promisee intends to discharge by means of a promisor's performance. *Wilson v. Anderson* (1962) 208 Cal.App.2d 62 [25 Cal. Rptr. 105] is an illustration. In that case, landowners entered into a contract with broker A to find a buyer for their ranch, but then actually sold

the ranch through broker B. Before the sale, the owners and broker B entered into an oral agreement under which B would pay one-third of his commission to A. When B refused to pay A, A sued as a third party beneficiary of the oral agreement between B and the owners. Affirming a judgment for A, the Court of Appeal stated that A was a creditor beneficiary of the oral agreement. The preexisting obligation between A and the owners was the original brokerage contract between them. (*Id.* at pp. 63-64.)

In this case, the Beebowers did have a preexisting obligation to the Souzas because the lease required the Beebowers to pay the water bill. A promise by the district (if there had been one) to enforce paragraph 21 against the Beebowers, however, could not be construed as a promise by the district to fulfill the Beebowers' lease obligation to pay the water bill. The district's putative promise would be a promise to compel *the Beebowers* to pay the bill or ensure its payment--not a promise to pay the bill *for* the Beebowers. We are aware of no case in which a third party beneficiary contract was formed when a promisee bargained for and obtained a promisor's engagement to force the promisee to satisfy its own obligation to the third party. The Souzas would not be creditor beneficiaries of the water agreement even if it had contained a promise by the district to enforce paragraph 21 against the Beebowers. Consequently, the Souzas were neither donee nor creditor beneficiaries. These are the only two kinds of intended third party beneficiaries, so the Souzas were not intended third party beneficiaries at all. (See *Martinez v. Socoma Companies, Inc.*, *supra*, 11 Cal.3d at pp. 400-403, 407 [plaintiffs who were neither creditor nor donee beneficiaries were not third party beneficiaries].)

Next, by awarding the Souzas a refund, the trial court violated the rule that a third party beneficiary may not obtain a greater recovery than that which would have been available to the promisee. (*Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal.App.3d 122, 132 [226 Cal. Rptr. 321].)

> "A third party beneficiary cannot assert greater rights than those of the promisee under the contract. [Citation.] Because the foundation of any right the third person may have is the promisor's contract, '[w]hen [a] plaintiff seeks to secure benefits under a contract as to which he is a third-party beneficiary, he must take the contract as he finds it. ... [T]he third party cannot select the parts favorable to him and reject those unfavorable to him.' [Citation.]" (*Marina Tenants Assn. v. Deauville Marina Development Co.*, *supra*, 181 Cal.App.3d at p. 132.)

Even if the water agreement contained a promise by the district to enforce paragraph 21, the Beebowers could not conceivably have obtained any recovery for a breach of that promise. The contract required the Beebowers to pay for the water. There is no imaginable scenario under which a failure of the district to enforce paragraph 21 could result in relief for the Beebowers from having to pay for water they used. By relying on the district's supposed promise to follow paragraph 21 while ignoring the Beebowers' obligation to pay for the water, the Souzas seek to " 'select the parts [of the agreement] favorable to [them] and reject those unfavorable to [them].' " (*Marina Tenants Assn. v. Deauville Marina Development Co.*, *supra*,

181 Cal.App.3d at p. 132.) The third party beneficiary doctrine does not allow this.

Finally, the Souzas cannot recover on the water agreement as third party beneficiaries because the promisees – the Beebowers--undisputedly breached the agreement and were liable to the promisor--the district--for an amount equal to the amount the Souzas paid. If the promisee breaches the contract, and the damages to the promisor equal or exceed the amount of the benefit the promisor was to confer on the third party, the third party cannot recover. *(Votaw Precision Tool Co. v. Air Canada* (1976) 60 Cal.App.3d 52, 56 [131 Cal. Rptr. 335].) The Beebowers' nonpayment damaged the district in an amount equal to the amount the Souzas claim the enforcement of paragraph 21 would have saved them (the unpaid amount and the amount the Souzas had to pay being the same, of course), so the Souzas cannot recover any refund.

None of the remaining arguments and considerations in the statement of decision on this issue are persuasive. The court stated that the Souzas must be intended and not incidental beneficiaries of the water agreement and that paragraph 21 "would explicitly benefit" them if followed because it would prevent unpaid charges from accruing and therefore would avoid any assessment for unpaid charges. That the Souzas would as a matter of fact benefit would not be enough to show they were intended third party beneficiaries even if the water agreement contained the district's promise to follow paragraph 21. Without more, a party who simply will receive a benefit from performance is only an incidental beneficiary.

The court also stated that "it is clear that *only* the plaintiffs could benefit from Westlands implementing the advance payment requirements on Beebower." Further, "it is

difficult to see who else would benefit" from this, because the unpaid charges could not be transferred to other landowners in the district. Even assuming it is true that the district never passes its bad debt expenses on to its customers (though the court supplied no reason to believe this, and it is hard to see how those expenses could be covered otherwise), the court's conclusion does not follow. Paragraph 21 plainly is designed to benefit the district itself. Like any other business entity, it benefits from self-protective measures taken against customers who present credit risks. The fact that the district has another remedy in its power to assess the charges against the land does not show that it needs no other protection. That remedy involves costs and delays the district has an interest in avoiding. Consequently, there is no need to assume the Souzas were intended to benefit because otherwise paragraph 21 would not benefit anyone. Further, that assumption has the untenable consequence that in cases where the delinquent customer *is* the owner, the rule has no purpose at all and protects no one. (Presumably, no one would argue that the owner can invoke paragraph 21 to avoid payment in *that* situation.)

Finally, the trial court's reliance on *Zigas v. Superior Court* (1981) 120 Cal.App.3d 827 [174 Cal. Rptr. 806] is misplaced. That case involved a contract between landlords and the United States Department of Housing and Urban Development, pursuant to which the government insured a mortgage on an apartment building purchased by the landlords. In return, the landlords agreed, among other things, to limits on the rents they would charge tenants. The tenants sued the landlords, claiming they were overcharged. (*Id.* at pp. 830-831.) The Court of Appeal held that the tenants could sue on the contract as third party beneficiaries. Based on a review of the underlying statutes, it concluded that the point of the contract was to provide a benefit to the tenants of the building. Further,

the landlords' promise to comply with the rent caps "could *only* benefit the tenants." (*Id.* at pp. 835-836.) Nothing similar is at issue here. Paragraph 21 is a measure to protect the district from credit risks, not a benefit program for landowners. And as we have just explained, the Souzas are not the only parties who could benefit from paragraph 21, as the district itself benefits and the benefit to the district is the point.

Zigas and the present case are disanalogous in other important ways as well. In *Zigas*, the third parties sought to enforce a promise the landlords (the promisors) made to the government (the promisee) and which the promisee intended to benefit the third parties. In this case, the third parties sought to enforce a promise the district did *not* make to the Beebowers which, even if it had been made, was not shown by any evidence to be intended by the promisees (the Beebowers) to be for the benefit of the third parties.

In sum: The water agreement contained no promise by the district that would have benefited the Souzas if performed. If it had, there was still no evidence in the agreement that the promisees (the Beebowers) intended the Souzas to benefit from it. If there had been a promise and the promisees had intended the Souzas to benefit from it, third party recovery of a refund for water charges would still be barred because no recovery by the promisees would have been possible and because the promisees were in breach. For all these reasons, the trial court erred in allowing the Souzas to recover for breach of contract on a third party beneficiary theory.

III. Equal protection

As part of their cross-appeal, the Souzas argue that the addition of the water charges to the assessment on their land

violated their constitutional right to equal protection of the laws. Therefore, they contend, even if the trial court erred in finding for them on the theories discussed above, the judgment should be affirmed. The district contends that we should refuse to reach this constitutional issue because the Souzas did not raise it before the trial court, even though they did raise a related issue of statutory interpretation. We agree with the district's view.

In their trial brief, the Souzas argued that Water Code section 36726 (quoted in part I above) "does not by its express terms permit" the district to add a tenant's unpaid water charges to the assessment on the land--i.e., it states simply that a district may add unpaid charges for water used on the land, without asserting or denying that there is an exception for water used by a tenant--and therefore the provision is "ambiguous." The Souzas urged the trial court to resolve the purported ambiguity by referring to Water Code section 37212. Section 37212 is within part 7.5 of division 13 of the Water Code, which "provides an alternative method for the levy, collection and enforcement of district assessments ... ." (Wat. Code, § 37200.) Any water district may elect to proceed under part 7.5 for the levy of its assessments. (Wat. Code, § 37203.) If a district elects to proceed under part 7.5, the board of supervisors of the county in which the district or a part of the district is located levies and collects assessments, including add-on assessments for unpaid water charges, on behalf of the district. (Wat. Code, § § 37207, 37212.) Unlike section 36726--which applies to districts that (like Westlands) have not elected to proceed under part 7.5--section 37212 provides for add-on assessments for unpaid water charges only where water services were "requested in writing by the owner of the property ... ." (Wat. Code, § 37212, subd. (a)(1).) The Souzas argued that the same limitation should be read into section 36726.

The trial court rejected this argument in a mid-trial ruling. It stated:

> "Contention is made that Water Code section 36726 ... subdivision (c)[,] under which this assessment was made[,] ... was ambiguous and should be read in connection with other code sections ... . It's my conclusion that Water Code section 36726(c) is unambiguous on its face and clearly in my view allows assessments against the whole parcel of land ... . While it does not make specific reference to a landlord, it is clear that a parcel of land contemplates an owner of some kind, and I think that--and I will say this, the argument made by the plaintiffs in this case was extremely inventive, and I mean that sincerely, not in any sense sarcastically at all. It's something that wouldn't even have occurred to me, and I understand the argument, but I think that the code section itself, the charge ultimately goes to the parcel of land it seems to me and it's not unclear to me as I read it, so ... that's my ruling on that."

Now the Souzas contend that their right to equal protection of the laws was violated because a similarly situated landowner in a district that used the county for levying assessments would only have had to pay a delinquent tenant's bill if the owner had requested water service in writing. There is no rational basis, they contend, for the difference in treatment. To avoid the necessity of invalidating Water Code section 36726, they further argue, we should construe that section as if it also contained a request-in-writing requirement. This is a distinctly different issue from the one the Souzas

raised in the trial court. The original argument was that section 36726 was ambiguous and the court should use section 37212 to resolve the ambiguity. The new argument is that section 36726 is unconstitutional if read literally and should be read as if it were the same as section 37212 to save it from invalidation.[4]

The Souzas are not entitled to raise the new issue for the first time on appeal. They argue that we may reach the issue even if it was not raised in the trial court because it presents a pure question of law.[5] There is no rule, however, that an appellate court *must* consider a pure question of law raised for the first time on appeal. Instead, the decision to do so or not "is largely a question of the appellate court's discretion." (*Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167 [143 Cal. Rptr. 633].) Here, we are dealing not with an erroneous ruling to which no objection was raised, but with an entire substantive theory of the defendant's liability--unconstitutionality of the operative statute--that was not litigated at all in the trial court. (7) Further, "we have an obligation to avoid deciding constitutional questions unless it is absolutely necessary to do so." *(City of Huntington Park v.*

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[4]To the extent the Souzas' brief can be interpreted as *also* renewing the ambiguity argument the trial court rejected, we agree with the trial court's view. Water Code section 36726, subdivision (c), authorizes an add-on assessment and a lien on "the parcel upon which the water for which the charges are unpaid was used ... ." The assessment and lien are upon the land. The absence of an exception for tenant-occupied land is not an ambiguity.

[5]They also argue that their trial brief did raise "the constitutionality of these statutes," and they cite a page of their trial brief. The cited page, however, says nothing about equal protection. The only hint of a constitutional issue on the page is a parenthetical reference to "due process rights," accompanied by no argument or citation of authority of any kind.

Superior Court (1995) 34 Cal.App.4th 1293, 1299 [41 Cal. Rptr. 2d 68].) For these reasons, we decline to reach the equal protection issue.

IV. Governmental immunity

Because of the conclusions reached above, we need not discuss the district's argument that the Souzas' contract and invalid assessment claims should have been barred by governmental immunity.

V. Guaranty

The trial court ruled that the Souzas could recover against ACCO on the guaranty as third party beneficiaries for the same reasons the Souzas could recover against the district on the water agreement as third party beneficiaries: Paragraph 21 was intended to benefit the Souzas, so the guaranty, given pursuant to paragraph 21, must also have been intended to benefit them. This analysis would be erroneous even if the court's ruling on the water agreement was not. The water agreement and the guaranty are different contracts with different parties. The meaning of the guaranty and the intent of its parties cannot be inferred from the meaning of the water agreement and the intent of its parties. An independent analysis of the guaranty is necessary.

The Souzas propose an independent analysis in their brief. They assert that the district is the promisee, and acknowledge that Dave Ciapponi, who signed ACCO's guaranty letter on behalf of the district, did not testify that he had any intent that the Souzas would benefit by ACCO's performance. But they argue that Ciapponi's intent is irrelevant because he was not involved in negotiating the guaranty. Then they contend

that the promisee's purpose must be "determined by analyzing the purpose for which the guarantee was given ... ." This analysis in turn shows that the Souzas were intended beneficiaries because "a benefit to the landowner is inherent in the acceptance of a guarantee itself."

We reject this analysis also. Two considerations invalidate the judgment for the Souzas on the guaranty.

First, the Souzas could not recover as third party beneficiaries as a matter of law. If, as the Souzas argue, ACCO was the promisor, the district was the promisee, and the district intended ACCO's promise to benefit the Souzas, then the Souzas were entitled to enforce ACCO's performance, but could assert no greater rights than the district could. (*Marina Tenants Assn. v. Deauville Marina Development Co.*, *supra*, 181 Cal.App.3d at p. 132.) The district, however, could recover nothing from ACCO because it had already received full payment from the Souzas. The creditor in a suretyship[6] relationship--here, the district--cannot recover against the surety if it has already recovered the full amount of the debt from another source. "The creditor is entitled to only one performance, and if the creditor receives that by payment or other satisfaction, the surety is discharged." (23 Williston on Contracts (4th ed. 2002) § 61:11, p. 39.)

This principle was applied in *John P. Mills Organization, Inc. v. Unger* (1932) 215 Cal. 308 [9 P.2d 833], in which the Supreme Court considered a surety bond provided by a purchaser of land to the seller. The seller lent the purchase price to the purchaser and the purchaser agreed to build houses

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[6]A guarantor is a surety. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 1002, p. 1095.)

to certain specifications on the land. When the purchaser failed to build as specified and defaulted on the loan, the seller re-purchased the land at a trustee's sale for the full amount of the purchaser's indebtedness. Then it sued the surety to recover on the bond. (*Id.* at pp. 309-310.) Reasoning that if the purchaser had paid off the loan the seller would be entitled to nothing more--even if the purchaser had also failed to build as promised--the Supreme Court held that the trustee's sale satisfied the purchaser's obligation in full. As a result, there was no debt left for the bond to cover, and the surety was discharged. (*Id.* at pp. 310-311; see also *LeFlore v. Grass Harp Productions, Inc.* (1997) 57 Cal.App.4th 824, 828-830, 840 [67 Cal. Rptr. 2d 340] [guarantor discharged when principal satisfied obligation to creditor].)

Because the district, having been paid in full, was in no position to collect any more money on the guaranty, its alleged third party beneficiaries, the Souzas, could not do so either. It makes no difference that it was the Souzas themselves who paid the district. "Payment by a third person does not change the result. If the third party wishes to keep the obligation alive, that party must buy the obligation, not pay it." (23 Williston, *supra*, § 61:11 at p. 41.) In other words, the only way the Souzas could have avoided discharging the guaranty when they paid the water charges would have been to ask the district to assign its claim against ACCO to them first.

The second reason the Souzas cannot recover on the guaranty as third party beneficiaries is that there was no substantial evidence that the promisee intended the Souzas to be beneficiaries. As the Souzas' brief acknowledges, the extrinsic evidence (Ciapponi's testimony) provides no support for their position, and they must rely on the terms of the guaranty itself, as expressed in the letter from ACCO signed by the district and

the Beebowers. The Souzas' brief states: "The only relevant evidence presented at trial was the plain language of the Water Agreement ... ." But the letter does not identify the Souzas, individually or as part of a class of intended beneficiaries, and does not purport to confer any benefit on them. It is insufficient to observe, as the Souzas do, that they would inevitably benefit from performance of the guaranty because they were secondarily liable for the debt. The Souzas have cited no authority, and we know of none, supporting the notion that every party on whom the burden to pay a debt will fall if a contract to pay it is breached is necessarily a third party beneficiary of that broken contract. In short, the evidence was sufficient to establish no more than that the Souzas were incidental beneficiaries of the guaranty.[7]

The trial court erred in ruling that the Souzas could recover on the ACCO guaranty as third party beneficiaries. In view of this, it is unnecessary to discuss ACCO's argument that it did not breach the guaranty agreement.

VI. Attorneys' fees and costs

Because we hold that the court erred in entering judgment for the Souzas, we need not consider the district's arguments about why the grounds the court relied on in awarding attorneys' fees and costs do not support the award. Instead, the award of attorneys' fees and costs is reversed because the Souzas are not prevailing parties.

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[7]The Souzas' claim in their cross-appeal that the district should not get an offset for payments by ACCO is mooted by our holding.

VII. Conclusion

Water Code section 36726, subdivision (c), is a simple law. It permits a water district to add unpaid water charges to an assessment on the land where the water was used. Where the district chooses to do this, the law makes the owners of the land responsible for the unpaid charges. Nothing that happened in this case relieved the Souzas of that responsibility.

DISPOSITION

The judgments in favor of the Souzas against the district and ACCO and the award of attorneys' fees are reversed. The Souzas' cross-appeal is dismissed as moot. Costs are awarded to appellants.

/s/Wiseman
Wiseman, J.

WE CONCUR:

/s/ Vartabedian
Vartabedian, Acting P. J.

/s/ J. Gomes
Gomes, J.